No. _____

IN THE

Supreme Court of the United States

NEIL PATTERSON, JR.,

Petitioner,

v.

NEW YORK,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Thomas P. Schlosser*
Rob Roy Smith
MORISSET, SCHLOSSER, JOZWIAK & MCGAW
801 Second Ave., Ste. 1115
Seattle, WA 98104-1509
(206) 386-5200

**Counsel of Record for Petitioner*

(Additional Counsel listed on signature page)

QUESTIONS PRESENTED

Neil Patterson, Jr., an enrolled member of the Tuscarora Indian Nation, a federally recognized Indian tribe and one of the Six Nations of the Iroquois Confederacy, hereby petitions for the issuance of a writ of certiorari to restore Tuscarora treaty fishing rights to the lands that currently comprise Wilson Tuscarora State Park in New York State. Compelling reasons exist to grant the requested writ because the New York State Court of Appeals has decided important federal questions in a way that conflicts with relevant decisions of this Court. The following questions are presented for review:

1. Whether the Tuscarora Nation's fishing rights reserved in the Treaty of Canandaigua of 1794 are wholly derived from and dependent upon continued ownership of the lands by the Seneca Nation.

2. Whether the Tuscarora Nation's fishing rights reserved in the Treaty of Canandaigua of 1794 could be divested by implication by the Seneca Nation in an agreement to which the Tuscarora Nation was not a party.

TABLE OF CONTENTS

Page

Page

Page

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Page

Treaties

Page

Statutes

Other Authorities

TABLE OF APPENDICES

Page

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 2005 NY Int. 99. App. A, *infra*. The opinion of the Niagara County Court of June 29, 2004, is not reported. The opinion of the Town of Wilson Justice Court is not reported.

JURISDICTION

The opinion and judgment of the New York Court of Appeals were entered on June 14, 2005. Justice Ginsberg extended the time within which to file a petition for a writ of certiorari to and including October 27, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

RELEVANT STATUTORY PROVISIONS

1. Treaty with the Six Nations, 7 Stat. 15 (Oct. 22, 1784) (App. B, *infra*);

2. Treaty with the Six Nations, 7 Stat. 33 (Jan. 9, 1789) (App. C, *infra*);

3. Treaty with the Six Nations, 7 Stat. 44 (Nov. 11, 1794) (App. D, *infra*);

4. Agreement with the Seneca, 7 Stat. 601 (Sep. 15, 1797) (App. E, *infra*).

STATEMENT OF CASE

This petition presents significant treaty right questions arising from the Treaty of Canandaigua of 1794. Directly at issue are the treaty-reserved off-reservation fishing rights of Tuscarora Nation members. These rights, within lands thought to be subject to the reserved fishing rights of the Tuscarora Nation for the past 211 years, are now in jeopardy. The New York Court of Appeals has created a new "derivative treaty rights" theory and, in the process, has thrown much of this Court's settled law concerning treaty-reserved use rights into question.

I. The Six Nations' Use Rights Were Communal

The Tuscarora people originally used and occupied lands in what is now modern-day North Carolina. Due to persecution by European settlers, in 1713, at the conclusion of the so-called "Tuscarora War," the Tuscarora emigrated from North Carolina to New York. *Tuscarora v. United States*, 23 Ind. Cl. Comm. 140, 140 (1970). In 1714, the Tuscaroras took shelter with the Five Nations, or Iroquois Confederacy, in New York. Soon thereafter, the Tuscaroras were formally adopted into the Haudenosaunee as the sixth nation of the Confederacy, and the Confederacy became known as the "Six Nations."[1]

---

[1] The term "Haudenosaunee" means "People of the Longhouse." The longhouse, a multifamily dwelling constructed with a wood frame, rafters and an arched roof, and weatherproofed with large sheets of bark, was the traditional dwelling place of the Haudenosaunee people. *See* Robert W. Venables, INTRODUCTION TO THE SIX NATIONS OF NEW YORK:

See, e.g., Seneca Nation of Indians v. New York, 206 F. Supp.2d 448, 458 (W.D.N.Y. 2002), *aff'd*, 382 F.3d 245 (2d Cir. 2004) ("In the first part of the eighteenth century, the Iroquois were joined by the Tuscaroras and were then often referred to as the Six Nations of the Iroquois or simply the Six Nations"). The Six Nations include "the Cayugas, Mohawks, Oneidas, Onondagas, Senecas and Tuscaroras." *New York Indians v. United States*, 170 U.S. 1, 36 (1898).

At treaty times, the Six Nations hunted and fished "throughout an extensive area extending on both sides of Lakes Erie and Ontario."[2] *Seneca Nation of Indians*, 206 F. Supp.2d at 458; *Strong v. United States*, 31 Ind. Cl. Comm. 89, 95 (1973). Under the Constitution of the Five Nations, once the Tuscarora formally joined the Five Nations they were "accorded equal rights and privileges in all matters" with the other member nations, including hunting and fishing privileges. Arthur C. Parker, THE CONSTITUTION OF THE FIVE NATIONS 51, ¶ 75 (University

---

THE 1892 UNITED STATES EXTRA CENSUS BULLETIN at vii-viii (Nick Salvatore, ed., Cornell University Press 1995). The name Haudenosaunee not only evokes the communal spirit of the longhouse, but also serves as a metaphor for the Confederacy, which extended across much of what is now northern, central and western New York State.

[2] The Indian Claims Commission does not appear to have squarely addressed the exclusive use and occupancy of the lands in question. Neither the Six Nations nor the Seneca Nation appears to have sought compensation for exclusive use and occupancy of what is now Wilson Tuscarora State Park.

of the State of New York 1916). The Confederacy made "their hunting grounds one common tract and all have coequal right to hunt within it." *Id.* at 103; *see also* Robert W. Venables, *Some Observations on the Treaty of Canandaigua*, in TREATY OF CANANDAIGUA 1794: 200 YEARS OF TREATY RELATIONS BETWEEN THE IROQUOIS CONFEDERACY AND THE UNITED STATES at 95 (G. Peter Jemison and Anna M. Schein, eds. 2000) (custom and tradition of the Six Nations recognized communal hunting and fishing rights for all members of the Six Nations throughout the territories occupied or controlled by the Confederacy).

II. Three Treaties with the Six Nations

Like many Indian tribes, the Tuscarora were party to a series of treaties. As is relevant to the instant petition, on three separate occasions the United States entered into formal treaties with the Six Nations. The three treaties must be read in conjunction. The first two treaties (Ft. Stanwix and Ft. Harmar) secured possessory land rights to the Tuscarora. The third treaty (Canandaigua) reserved communal use rights to all the Six Nations to the lands covered by the Treaty of Canandaigua.

A. The Treaty with the Six Nations of 1784 (Treaty of Ft. Stanwix)

Tuscarora possessory rights were first recognized and affirmed by the United States in the Treaty with the Six Nations, also known as the Treaty of Ft. Stanwix, in 1784. 7 Stat. 15. The Treaty of Fort Stanwix provided, in part, that the "Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled." Treaty of Ft. Stanwix, art. II.[3] App. B at 13a.

B. The Treaty with the Six Nations of 1789 (Treaty of Ft. Harmar)

Subsequently, in the Treaty with the Six Nations, also known as the Treaty of Ft. Harmar, 7 Stat. 33 (Jan. 9, 1789), the United States "renew[ed] and confirm[ed]" the Treaty of Fort Stanwix and "again secured and confirmed [the Tuscarora] in the possession of their respective lands." Treaty of Ft. Harmar, art. I, III. App. C at 17a, 19a.

---

[3] This recognition was apparently a reward for the participation by the Tuscarora and Oneida Nations on the colonial side in the Revolutionary War. *See* D. Landy, TUSCARORA AMONG THE IROQUOIS, IN NORTHEAST, (Handbook of North American Indians), (B.G. Trigger, ed.) at 520 ("most [Tuscarora] were sympathetic to the Americans and fought on that side in the first years of the war"); *Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1152 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) (stating that the Oneidas and the Tuscaroras had sided with the United States during the Revolutionary War).

C. The Treaty with the Six Nations of 1794 (Treaty of Canandaigua)

Petitioner's right to fish in Wilson Tuscarora State Park and in certain other areas of New York State that are not part of the present-day Tuscarora Indian Reservation, was reserved by the Treaty with the Six Nations, also known as the Treaty of Canandaigua, in 1794. 7 Stat. 44. App. D at 23a. Chiefs of the Tuscarora were signatories to the Treaty of Canandaigua. The Treaty was proclaimed on January 21, 1795.

The Treaty of Canandaigua was a peace treaty intended to ensure the neutrality of the powerful Six Nations in the war between the United States and the Indian tribes occupying the then-Northwest Territory which occurred following the Revolutionary War. *People ex rel. Ray v. Martin*, 294 N.Y. 61, 68 (1945) (explaining that the Treaty "was made not to set off lands to the Indians or to provide for their government, but as a treaty of peace to put an end to a state of war and guard against its recurrence"); *Seneca Nation of Indians*, 206 F. Supp.2d at 486; *see also Six Nations v. United States*, 23 Ind. Cl. Comm. 376, 391 (1970) (discussing purposes of Treaty of Canandaigua).

With the lands occupied by the Tuscarora having previously been recognized in the 1784 Treaty of Fort Stanwix and the 1789 Treaty of Fort Harmar, the Treaty of Canandaigua delineated in Articles II and III the lands then possessed by the Oneida, Onondaga, Cayuga, and Seneca nations, and acknowledged those lands to be their

property. 7 Stat. 44. Article III of the Treaty of Canandaigua described the lands belonging to the Seneca Nation, including present-day Wilson Tuscarora State Park. With respect to use of those lands, Article III provides:

> Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Treaty of Canandaigua, art. III (emphasis added). App. D at 25a. This language confirms independent use rights for all the Six Nations to the lands possessed by the Seneca.

The commitment to "free use and enjoyment" for the Six Nations on the part of the United States was reiterated in Article IV, this time without limitation to the lands described as the property of the Seneca, as follows:

> The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and

> enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

Id. art. IV (emphasis added). App. D at 25a. In other words, the Treaty of Canandaigua secured to the Six Nations the unconditioned "free use and enjoyment" of all the Six Nations' lands covered by the Treaty, including the lands comprising present day Wilson Tuscarora State Park, regardless of the Senecas' rights under other provisions. *Id.* art. III, IV. *See, e.g., Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968) (discussing treaty construction).

The Tuscarora Nation has never relinquished its right to the "free use and enjoyment" of the lands at issue, nor has that right been abrogated by subsequent treaty or Congressional act. *The New York Indians*, 72 U.S. 761, 768 (1866) (finding that the Treaty of Canandaigua's guarantee of undisturbed free use and enjoyment "are the guarantees given by the United States, and which her faith is pledged to uphold").

III. Agreement with the Seneca 1797

Three years after the Treaty of Canandaigua, one of the Six Nations, the Seneca Nation, entered into a separate agreement with the United States. 7 Stat. 601. App. E at 32a. This Agreement has been mistakenly referred to as the Treaty of Big Tree. However, the Agreement is a

contract between the Seneca and Robert Morris, a private land speculator, "under the sanction of the United States." *Id.* It is not a treaty *per se*.

Under the Agreement, the Seneca agreed to sell to Morris certain lands that had been recognized as owned by the Seneca in Article III of the Treaty of Canandaigua. The Agreement also reserved "to [the Seneca], the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." *Id.*; *Kennedy v. Becker*, 241 U.S. 556 (1916) (construing Seneca rights under the Agreement with the Seneca).

The Agreement does not mention the Tuscarora Nation, the previous three treaties with the Six Nations, or the use rights of the Tuscarora or the other tribes of the Six Nations thereunder. The Agreement was not signed by representatives of the Tuscarora Nation.

IV. Litigation Below

Petitioner Neil Patterson, Jr. was ice-fishing in Wilson Tuscarora State Park near the shores of Lake Ontario when he was cited by a New York State Environmental Conservation Officer for failing to have an identifying state tag with his name and address on his ice-fishing equipment. The park is located outside the reservation boundaries of the Tuscarora Reservation, but within lands described in Article III of the Treaty of Canandaigua.

Mr. Patterson's ticket alleging a violation of state regulations was returnable in the Town of Wilson Justice Court on February 19, 2003. Mr. Patterson entered a plea of not guilty. On March 26, 2003, a bench trial was held at which Mr. Patterson appeared *pro se* and testified that he was fishing at Wilson Tuscarora State Park pursuant to rights guaranteed to him by the 1794 Treaty of Canandaigua. Mr. Patterson was convicted and sentenced to pay a fine of twenty-five dollars. The Niagara County Court affirmed the conviction on June 29, 2004. On July 26, 2004, Mr. Patterson moved for leave to appeal to the New York Court of Appeals, which was subsequently granted.

The New York Court of Appeals affirmed the conviction on June 14, 2005. The Court of Appeals held that "the Tuscarora – and derivatively, defendant – have no right under the 1794 Treaty of Canandaigua to engage in off-reservation fishing on former Seneca lands." *People v. Patterson*, 2005 N.Y. Int. 99 (N.Y. Ct. App. 2005) (App. A at 5a-6a). The court below reached this decision based on what it characterized "the plain language of the Treaty of Canandaigua, along with the history of the land in question" and in reliance upon this Court's footnote 18 in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 121 n.18 (1960).[4] *Id.* at 6a.

---

[4] The Court need not reexamine *Federal Power* to rule in Tuscarora's favor in this matter because neither the Treaty of Canandaigua nor the use rights of the Tuscarora Nation were before the Court in *Federal Power*. *Federal Power* involved

With no historical record before it, the court below reviewed the Treaty of Canandaigua in isolation, never once discussing the two previous treaties with the Six Nations, and concluded that "Articles III and IV [of the Treaty of Canandaigua] . . . clearly contemplate that the Seneca and the other Six Nations would have a right to free use and enjoyment of Seneca land until such time as the Seneca ceded it . . . . In short, the Tuscarora Nation's fishing rights on the land in question were wholly contingent on continued ownership of the land by the Seneca." *Id.* at 8a. Thus, the Court of Appeals concluded that "[w]hen the Seneca divested themselves of their interest in the land by the Treaty of Big Tree of 1797, the Tuscarora right to free use and enjoyment ended." *Id.* at

---

different lands than those at issue here, involved an issue of statutory interpretation not relevant here, and was explicitly limited to a question of land title, not usufructuary rights. As stated by this Court, *Federal Power* involved only two discrete issues, "namely, (1) whether the Tuscarora lands covered by the [Federal Power] Commission's license are part of a 'reservation' as defined and used in the Federal Power Act . . . and, if not, (2) whether those lands may be condemned by the licensee, under the eminent domain powers conferred by . . . the Federal Power Act . . .." *Federal Power,* 362 U.S. at 110. Those two issues, on their face, have no bearing on the case at bar. Footnote 18 was, at best, dictum that was not necessary to the determination of the question of condemnation authority under the Federal Power Act and is not controlling here. Elevating footnote dictum to a holding eviscerating use rights reserved in a treaty fails to live up to Justice Black's plea that "Great nations, like great men, should keep their word." *Id.* at 142 (Black, J. dissenting).

9a. The Court of Appeals rejected use of the canons of Indian treaty interpretation and overlooked the fact that the Big Tree Agreement never mentions the Tuscarora Nation or its use rights. *Id.* at 8a-10a.

REASONS FOR GRANTING WRIT

The New York Court of Appeals departed from relevant decisions of this Court, most recently *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and ignored long-standing maxims elucidated by this Court concerning treaty rights to eliminate off-reservation fishing rights of the Tuscarora Nation and its members. The decision of the court below is plainly at odds with this Court's well-established jurisprudence concerning important federal questions concerning Indian use rights in two ways.

First, the court below wholly ignored this Court's consistent rulings that treaty-reserved usufruct rights for Indian hunting and fishing exist independently of continued land ownership. *E.g., Mille Lacs,* 526 U.S. at 201-02. The New York Court of Appeals was plainly wrong when it held that the Tuscarora Nation's fishing rights reserved in the Treaty of Canandaigua of 1794 on the lands that currently comprise Wilson Tuscarora State Park are wholly contingent on continued ownership of those lands by the Seneca Nation.

Second, the New York Court of Appeals failed to follow the Court's sound approach to Indian treaty interpretation that Indians retain whatever rights they

possessed which are not relinquished by treaty or taken by Congress, and that such rights are reserved by implication if they are not expressly relinquished. *E.g., Mille Lacs,* 526 U.S. at 203-04. The court below was wrong when it held that the fishing rights of the Tuscarora Nation were divested by implication by the Seneca Nation in an agreement to which the Tuscarora Nation was not a party and in which the Tuscarora Nation was not mentioned.

If allowed to stand, the opinion of the New York Court of Appeals will disturb previously settled treaty-reserved Indian use rights. The erroneous decision of the New York Court of Appeals sweeps broadly, fundamentally altering maxims of Indian treaty interpretation laid down by the Court. More than the reserved use rights of the Tuscarora Nation's members are at stake. The decision below dramatically curtails the reserved fishing rights of six other federally recognized Indian tribes under the Treaty of Canandaigua and other tribes with similar reserved off-reservation fishing rights in lands that neither they, nor their historical allies, currently own in fee simple absolute.[5]

---

[5] The Seneca Nation divided into two federally recognized Indiana tribes: the Seneca Nation of Indians and the Tonawanda Band of Seneca Indians. Also directly affected are the Cayugas, Mohawks, Oneidas, and Onondagas.

I. The Tuscarora Nation's Fishing Rights Exist Independently of Land Ownership.

A. The Court Below Departed from This Court's Precedent that Indian Use Rights Are Separate From Land Ownership.

The New York Court of Appeals' conclusion that "the Tuscarora Nation's fishing rights on the land in question were wholly contingent on continued ownership of the land by the Seneca" is wrong as a matter of law and departs from this Court's prior decisions holding that treaty-reserved fishing rights exist independently from land ownership. *Patterson*, App. A at 8a (emphasis added).

1. The Tuscarora Nation Reserved Fishing Rights in the Treaty of Canandaigua.

The Tuscarora Nation holds reserved fishing rights under the "free use and enjoyment" clauses of Articles III and IV of the Treaty of Canandaigua. The only court to have considered the Treaty's "free use and enjoyment" clauses expressly found that the Treaty secured hunting and fishing rights to the Six Nations. *People v. Redeye*, 78 Misc.2d 834, 836-37 (Cattaraugus Co. Ct. 1974) (discussing application of state fishing laws against members of the Seneca Nation fishing within the reservation and finding that, "[a]lthough the Treaty did not contain a specific reference to hunting and fishing rights, legal authorities have held universally that the existence of

such rights is not to be conditioned on their explicit mention in federal treaties and statutes . . . hunting and fishing rights [were] secured . . . by the treaty of 1794"), *citing Menominee Tribe*, 391 U.S. at 404. That the Treaty of Canandaigua's "free use and enjoyment" clauses included a reserved fishing right is not in dispute. *See generally Patterson*, App. A.

2. Treaty Fishing Rights Exist Independently From Land Ownership.

There is a substantial conflict between the New York Court of Appeals' conclusion and this Court's precedent concerning the existence of treaty-reserved use rights on lands that are not currently owned by the tribe. This conflict is starkly illuminated by the long line of cases where this Court has consistently recognized that usufructuary rights exist independent of land ownership. *E.g., Mille Lacs*, 526 U.S. at 201-02 (concluding "the Chippewa's usufructuary rights under the 1837 Treaty existed independently of land ownership"); *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765-66 (1985) (holding "[w]e agree with the Court of Appeals that Indians may enjoy special hunting and fishing rights that are independent of any ownership of land"); *Washington v. Washington Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 681 (1979) (confirming rights of Indians to fish at usual and accustomed fishing areas, including non-Indian private property, under Stevens Treaties); *see also Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184,

201 (W.D. Wisc. 1996), *aff'd*, 161 F.3d 449, *cert. denied*, 526 U.S. 1066 (1999) (finding that "if a tribe has a treaty-reserved usufructuary right of indefinite duration, that right can continue to exist even if the tribe cedes its right of occupancy in the same land on which the use right runs") *citing United States v. Winans*, 198 U.S. 371, 381 (1905); *Confederated Tribes of Chehalis v. State of Washington*, 96 F.3d 334, 341 (9th Cir. 1996), *cert. denied*, 520 U.S. 1168 (extinguishment of aboriginal title to land does not terminate fishing rights guaranteed by treaty); *see also Tlingit & Haida Indians of Alaska v. United States*, 389 F.2d 778, 785 (Ct. Cl. 1968) (non-exclusive fishing rights have been held to exist "irrespective of a tribe's ability to prove aboriginal title to lands, and it also exists independent of congressional recognition"). The court below diverged from these decisions of the Court to the severe detriment of the Tuscarora Nation and its members.

The Treaty of Canandaigua did not make the Tuscaroras' fishing rights contingent upon the Seneca Nation's continued land ownership. The Tuscarora's off-reservation use rights were recognized and exercised on the land of another. 7 Stat. 44. App. D at 25a. Until now, as this Court has held in a multitude of cases, land ownership has had no necessary connection with the existence of the treaty-reserved right to use those lands. *E.g., Mille Lacs,* 526 U.S. at 201-02. The court below ignored these cases and created a conflict with this Court and among the lower courts that sharply undercuts tribal treaty use rights.

B. The Court Below Ignored Settled Canons of Treaty Construction to Render Use Rights Wholly Dependent Upon Land Ownership.

To support its erroneous conclusion linking land ownership with treaty-reserved use rights, the New York Court of Appeals eschewed this Court's directions in favor of its own modern day interpretation of the Treaty of Canandaigua to hold that the Treaty "clearly contemplate[d] that the Seneca and the other Six Nations would have a right to free use and enjoyment of Seneca land until such time as the Seneca ceded it." *Patterson*, App. A at 8a. The New York Court of Appeals reached this conclusion in an evidentiary vacuum and, in doing so, rendered part of the Treaty of Canandaigua meaningless. The approach adopted by the court below is contrary to the Court's pronouncements in several respects.

First, the New York Court of Appeals violated the Court's long standing canons of construction by reading the Treaty of Canandaigua in a manner that rendered the "free use and enjoyment" clause of Article IV surplusage. Principles of statutory and treaty construction preclude interpreting a treaty to render part of it meaningless. *Beck v. Prupis*, 529 U.S. 494, 506 (2000). Yet, the court below divested Article IV of the Treaty of all meaning by virtue of its singular focus on the "free use and enjoyment clause" of Article III which references only the Seneca lands. *Patterson,* App. A at 8a (no discussion of broader reservation of rights in Article IV). Due to its failure to read Articles III and IV *in pari materia*, the court below

effectively read-out of the Treaty Article IV which reserved "free use and enjoyment" to the Six Nations to all Treaty lands, not just those possessed by the Seneca. That the treaty drafters included Article IV, without the limiting condition of the Senecas' lands, confirms that the Tuscaroras' fishing rights exist irrespective of Seneca land ownership and the sale of that land.

Second, the New York Court of Appeals misperceived the Court's approach to Indian treaty canons of construction, thereby skewing its analysis of the Tuscaroras' fishing rights. The court below found that because the Treaty of Canandaigua "admit[s] of no ambiguity," the Indian treaty canons of construction do not apply. *Id.* at 8a. This is not the law. Indian treaties are to be construed liberally in favor of the Indians regardless of any perceived ambiguity in the treaty. *Passenger Fishing Vessel Ass'n*, 443 U.S. at 675-76 (applying canon without reference to ambiguity). The failure of the court below to apply Indian treaty canons of construction to construe the Treaty of Canandaigua clouded its judgment as to the effect, or lack thereof, of the Seneca Nation's land ownership on the Tuscaroras' use rights.

Third, the New York Court of Appeals interpreted the Treaty of Canandaigua as it understood the Treaty's terms today to the Tuscaroras' detriment. *Patterson*, App. A at 8a-10a. This is plainly improper. *Worcester v. Georgia*, 31 U.S. 515, 582 (1832) ("The language used in treaties with the Indians should never be construed to their prejudice . . .") (emphasis added). As this Court has

directed, the court below should have interpreted the Treaty of Canandaigua to the Tuscaroras' benefit, as the Tuscarora would have understood the Treaty's terms in 1794. *Fishing Vessel*, 443 U.S. at 675 (1979), *citing Jones v. Meehan*, 175 U.S. 1, 5 (1899) (holding that a treaty is to "be construed, not according to the technical meaning of its words to learned lawyers, but in a sense in which they would naturally be understood by the Indians"). The court below did no such thing. Instead, it erroneously assumed a legal acumen and familiarity with Western concepts of land tenure on the part of the Tuscarora without any citation to or analysis of the historical circumstances of the Treaty. *Mille Lacs*, 525 U.S. at 202 (stating that "central to the interpretation of treaties" is the review of the history and negotiations of the agreement).

The use rights of the Tuscarora Nation and its members exist independently of land ownership. This Court's cases providing the framework for Indian treaty interpretation were turned upside down by the court below when it eschewed any analysis of what the Tuscarora would have understood the Treaty to mean by simply assuming that words written 211 years ago mean what they do today. *See* Parker, *supra* (discussing Six Nations' fishing and hunting customs).

II. The Senecas' Sale of the Underlying Land Did Not, and Could Not, Abrogate Tuscarora Reserved Fishing Rights.

Compounding its legal blunder that Tuscarora use rights were dependent upon Seneca land ownership, the

court below reached the unprecedented legal conclusion - without citation to any controlling authority - that Tuscarora use rights were extinguished by implication through an agreement reached by the Seneca to which the Tuscarora Nation was not a party. *Patterson*, App. A at 8a ("[w]hen the Seneca divested themselves of their interest in the land by the Treaty of Big Tree of 1797, the Tuscarora right to free use and enjoyment ended"). This is not the law.

A. The Sale of Land Does Not Divest Use Rights.

As discussed above, under this Court's relevant decisions, the usufructuary rights of the Tuscarora Nation may comfortably exist independently of land ownership. *E.g., Mille Lacs*, 526 U.S. at 201-02. Therefore, as a threshold matter, the sale by the Seneca Nation of the lands now comprising Wilson Tuscarora State Park in the 1797 Agreement with the Seneca did not, and could not, extinguish or otherwise affect the reserved use rights of the Tuscarora Nation in those lands. Extinguishing the Tuscarora's use rights by implication directly conflicts with this Court's relevant decisions concerning abrogation of reserved rights.

B. Use Rights May Not Be Extinguished by Implication.

The United States' intent "to abrogate or modify a treaty is not to be lightly impugned to Congress." *Menominee Tribe*, 391 U.S. at 412-13 (holding that

Menominee hunting and fishing rights under the Treaty of Wolf River survived Congress' enactment of the Termination Act ending federal supervision over the tribe and the reservation lands). As this Court has long held, specifically with respect to the reserved right to fish, Indians retain whatever rights they possess which are not relinquished by treaty or taken by Congress. Treaties constitute "a grant of rights from . . . [the Indians and] a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). In other words, use rights are reserved by implication if they are not expressly relinquished. A contrary conclusion is inconsistent with the use of the resource by the Indians at the time of the treaty. *United States v. Wheeler*, 435 U.S. 313 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976); *Arizona v. California*, 373 U.S. 546 (1963); *Winters v. United States*, 207 U.S. 564 (1908). Indian fishing rights in particular are considered to be "property rights conferred by treaty." *See Menominee Tribe*, 391 U.S. at 413; *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 105 (1949).

The New York Court of Appeals failed to heed these controlling decisions of the Court. The Senecas' sale of their lands could not affect the Tuscaroras' use rights reserved in the Treaty of Canandaigua. The 1797 Agreement with the Seneca does not mention the Tuscarora Nation. 7 Stat. 601. The Agreement does not reference the three treaties with the Six Nations. *Id.* Most importantly, the Agreement does not mention the use rights of the Tuscarora Nation. *Id.; see, e.g., Mille Lacs*, 526 U.S. at 198 (finding that "silence" as to use rights suggests that use rights were not understood to be

addressed by the treaty). The Agreement plainly had no intended effect on Tuscarora's use rights.

The court below pointed to no language in the Agreement with the Seneca addressing the use rights of the other Six Nations. *Patterson*, App. A at 9a. Had the negotiators of the Agreement with the Seneca in 1797 intended that the usufructuary rights guaranteed to the Tuscarora - or any of the other Six Nations - in previous treaties be extinguished upon sale of the underlying lands by the Seneca, the Agreement would have so stated. It did not. The United States knew how to draft a treaty to revoke fishing and hunting rights, but did not do so here. *Mille Lacs*, 526 U.S. at 199-200 (absence of reference to use rights is a telling omission because treaty drafters had sophistication and experience to use express language when abrogating treaty rights).

There is no language to support the assumption that the negotiators of the Agreement with the Seneca chose, through silence, to revoke hunting and fishing rights of the Tuscarora Nation – rights upon which the traditions and customs of the Tuscarora people continue to depend.

C. Tuscarora Use Rights May Not Be Abrogated Through A Land Sale Agreement They Did Not Participate In.

The New York Court of Appeals also refused to follow this Court's decisions in finding that a land sale agreement could divest Tuscarora of their use rights even

though the Tuscarora Nation was not a party to the Agreement. *Patterson*, App. A at 8a.

The purpose of the Agreement with the Seneca was to sell land.[6] 7 Stat. 601. As such, it did not also alienate usufruct rights. *Mille Lacs,* 526 U.S. 199-200 (considering purpose of treaty and finding that because purpose of subsequent Chippewa treaty was the cession of land, the treaty did not abrogate previously reserved use rights). The use rights of the Six Nations are never mentioned. 7 Stat. 601. App. E at 32a-40a. Moreover, where use rights are mentioned, the Agreement preserves the Senecas' use rights in the lands that were sold. *Id.* If the Tuscaroras' rights were also affected, would not they too have been mentioned as either extinguished or

---

[6] Indeed, when properly viewed as a series, the Agreement with the Seneca stands in stark contrast to the preceding treaties. Unlike the three treaties with the Six Nations, the Agreement with the Seneca is a land sale contract. It is only with one tribe. It does not address the Six Nations as a communal group. It is hard to imagine that, a mere three years after the Treaty of Canandaigua, the United States would have sought, by implication (without so much as a reference), to divest the other Six Nations of their rights reserved under that Treaty in an agreement with only the Seneca. Like the Chippewa in *Mille Lacs*, "it is difficult to believe that" the Tuscarora Nation would allow the Seneca to "relinquish the usufructuary rights that it had fought to preserve . . . without at least a passing word about the relinquishment." *Mille Lacs*, 526 U.S. at 198.

reserved?[7] It is also telling that no compensation is provided for the alleged abrogation of the Tuscarora's use rights. *See United States v. Sioux Nation*, 448 U.S. 371 (1980) (finding that rights guaranteed by treaty are property rights and may not be taken except by explicit decision of the United States Congress and with full compensation).

The New York Court of Appeals also ignored this Court's ruling that treaty rights cannot be ceded by implication and certainly cannot be ceded by another tribe altogether. *E.g., United States v. Creek Nation*, 295 U.S. 103, 110 (1934) (to "give tribal lands to others" would be an "act of confiscation"); *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1936) (same). The Agreement was not signed by representatives of the Tuscarora Nation. 7 Stat. 601. App. E at 37a-39a. The Tuscaroras' use rights cannot be abrogated by an agreement to which they were not a party.

---

[7] The Seneca Nation's reservation of its own use rights highlights the folly of the New York Court of Appeals' reasoning. The court below found Tuscaroras' fishing rights are "wholly dependent" upon the Senecas' rights. *Patterson*, App. A at 8a. Assuming *arguendo* that this was the case, under the Court of Appeals reasoning, the Senecas' reservation of hunting and fishing rights in the Agreement should have also reserved the Tuscaroras' fishing rights as well. Yet, the Court of Appeals ignored its own logic and never made this conclusion.

The Court's axioms of Indian treaty construction were not applied by the court below. Simply put, one tribe cannot divest another tribe of its treaty-reserved rights. Likewise, the Tuscaroras' fishing rights cannot be extinguished by implication or conditioned on land ownership. The New York Court of Appeals' decision cannot be reconciled with this Court's consistent treatment of treaty-reserved fishing rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas P. Schlosser*
**Counsel of Record for Petitioner*
Rob Roy Smith
Morisset, Schlosser, Jozwiak & McGaw
801 Second Ave., Suite 1115
Seattle, WA 98104-1509
(206) 386-5200

Christopher A. Amato
Dreyer Boyajian LLP
75 Columbia Street
Albany, NY 12210
(518) 463-7784

Joseph J. Heath
716 East Washington St., Ste. 100
Syracuse, NY 13210
(315) 475-2559

Attorneys for Neil Patterson, Jr.

October 25, 2005

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS FOR THE STATE OF NEW YORK ENTERED ON JUNE 14, 2005

UNITED STATES COURT OF APPEALS FOR THE STATE OF NEW YORK

No. 91

THE PEOPLE & C.,

Respondent,

v.

NEIL PATTERSON, JR.,
Appellant

2005 NY Int. 99

June 14, 2005

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Christopher A. Amato, for appellant.
Andrew D. Bing, for respondent.

ROSENBLATT, J.:

Appendix A

On this appeal, we consider whether the Treaty of Canandaigua of 1794 (7 Stat 44) vests members of the Tuscarora Nation with off-reservation fishing rights on former Seneca lands, the boundaries of which are demarcated by Article III of the Treaty. We hold that it does not.

I.

Defendant, Neil Patterson, is an enrolled member of the Tuscarora Indian Nation, one of the Six Nations of the Iroquois Confederacy. In February 2003, a State Environmental Conservation Officer saw him ice fishing in Wilson-Tuscarora State Park without an identifying tag on his ice fishing tip-up.[1] The park, located in Niagara County, is near the shore of Lāke Ontario, outside the Tuscarora reservation, on former Seneca lands. The officer issued defendant a citation for violating 6 NYCRR 10.4-7, which provides that all "tip-ups must be marked with the name and address of the operator while . . . in the water."

Before the Town of Wilson Justice Court, defendant pleaded not guilty and requested a trial. The conservation officer prosecuted the case and testified that defendant's tip-up had no identification tag. Defendant responded that, under the Treaty of Canandaigua, he had a federally-protected treaty right to fish in Wilson-Tuscarora State Park and that, because section 10.4-7 does not represent a reasonable and necessary conservation measure, the State lacked the power to enforce the regulation against him.

Appendix A

The court found defendant guilty and imposed a 25 dollar fine.

Defendant appealed to County Court, which affirmed. Relying on the United States Supreme Court's opinion in *Federal Power Comm'n v Tuscarora Indians Nation* (362 US 99, 121 n18 [1960]), the court determined that members of the Tuscarora Nation enjoy no treaty right to engage in off-reservation fishing on former Seneca lands. A Judge of this Court granted defendant leave to appeal, and we now affirm.

II.

It is basic to our system of governance that "all Treaties made . . . shall be the supreme Law of the Land" (US Const, art VI, cl 2).[2] This principle applies with full force to treaties with the Native American nations (*see Settler v Lameer*, 507 F2d 231, 238 n16 [9th Cir 1974] ["The various Indian treaties constitute the Supreme Law of the Land"]). It is also fundamental that states have sovereign power to regulate hunting and fishing within their borders.[3]

In its "conservation necessity" line of cases, the United States Supreme Court has long experience in mediating between these two vying interests. In *Tulee v State of Washington* (315 US 681, 683-684 [1941]), the defendant, a member of the Yakima Nation, was charged with violating a state law requiring a license fee to catch

salmon with a net, in spite of treaty language providing that the Yakima retained an "exclusive right of taking fish in all the streams, where running through or bordering said reservation." The treaty also secured the Yakima's right of "taking fish at all usual and accustomed places" (*id.* at 683). The Supreme Court held that the state's attempt to impose a license fee on members of the Yakima was unconstitutional. Critical to the decision was the existence of a treaty fishing right in conflict with the state's regulatory scheme. The Court held that, in the face of this treaty right, the state retained only certain regulatory powers. It could impose on the Yakima, "equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish" (*id.*).

Similarly, in *Puyallup Tribe v Department of Game of Washington (Puyallup I)* (391 US 392 [1968]), the tribe had an off-reservation treaty right to take fish "at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory" (*id.* at 395). In light of this treaty, the Supreme Court determined that a state regulation prohibiting fixed net fishing could not be enforced against members of the Puyallup Nation absent a finding that the ban represented a "'reasonable and necessary' conservation measure" (*id.* at 402). It remanded for consideration of this question, as well as for findings on "the issue of equal protection implicit in the phrase 'in common with'" (*id.* at 403; *see also* Department

of Game of Washington v Puyallup Tribe [Puyallup II], 414 US 44 [1973]).

Echoing its opinion in *Tulee*, however, the Court emphasized that, confronted with a treaty off-reservation fishing right, the State may nevertheless regulate "the manner of fishing, the size of the take, . . . and the like. . . in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians" (*id.* at 398). Most recently, in *Antoine v Washington* (420 US 194 [1975]), the Court held that, in regulating Native American off-reservation treaty fishing rights, the "State must demonstrate that its regulation is a reasonable and necessary conservation measure and that its application to the Indians is necessary in the interest of conservation" (*id.* at 207 [internal citations omitted]).

Essentially, this line of cases stands for the proposition that a state law or regulation may impair an off-reservation treaty fishing right only when (1) it represents a reasonable and necessary conservation measure and (2) does not discriminate against the Native American treaty rightholders. The existence of, first, a treaty right and, second, a conflict between the treaty right and a state statute or regulation is the sine qua non of the Supreme Court's conservation necessity jurisprudence. Absent a treaty fishing right, the state enjoys the full run of its police powers in regulating off-reservation fishing. Today, we hold that the Tuscarora -- and, derivatively, defendant -- have no right under the 1794 Treaty of

Appendix A

Canandaigua to engage in off-reservation fishing on former Seneca lands.[4] Therefore, we need not consider whether 6 NYCRR 10.4-7 constitutes a reasonable and necessary conservation measure under *Tulee* and its progeny. The regulation may be applied to members of the Tuscarora fishing off-reservation, just as it applies to everyone else who ice fishes within the State. In reaching this result, we are influenced by the plain language of the Treaty of Canandaigua, along with the history of the land in question and the Supreme Court's opinion in *Federal Power Comm'n v Tuscarora Indian Nation* (362 US 99, 121 n18 [1960]).

Article III of the Treaty first demarcates the lands of the Seneca Nation. It then provides,

"Now, the United States acknowledge that all the land within the aforementioned boundaries, to be property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."

Article IV states that,

"The United States having thus described and acknowledged what lands belong to the Oneidas,

Appendix A

Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundary of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof."

In 1797, three years after signing the Treaty of Canandaigua, the Seneca surrendered their ownership of the land to the United States by the Treaty of Big Tree (7 Stat 601). Defendant argues, however, that the "free use and enjoyment" language in Articles III and IV grants the Tuscarora, as one of the Six Nations, a separate, usufructuary[5] fishing right on Seneca lands independent of the Seneca's possessory interest in the land. The Treaty of Canandaigua, he maintains, constitutes an official recognition of the Iroquois tradition of communal hunting and fishing rights for all members of the Six Nations throughout the territory of the Confederacy. We are sensitive to the historical customs and values of the Six Nations, but we are not persuaded by this reading of the Treaty. Although, as defendant claims, a treaty may provide for usufructuary fishing rights that survive the conveyance of the original possessor's title to the land (*see generally* Minnesota v Mille Lacs Band of Chippewa Indians, 526 US 172 [1999]), the Treaty of Canandaigua does not create such a right.

Appendix A

We are mindful of the bedrock principle of Native American treaty interpretation that any possible ambiguities be resolved in favor of the Native American signatories (*see* Worcester v State of Georgia, 31 US 515, 582 [1832]; Jones v Meehan, 175 US 1, 11 [1899]). We further appreciate that, where the scope of a treaty right is unclear, we must look "beyond the written words to the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties'" (Mille Lacs, 526 US at 196). Articles III and IV, however, admit of no ambiguity. They clearly contemplate that the Seneca and the other Six Nations would have a right to free use and enjoyment of Seneca land until such time as the Seneca ceded it to "the people of the United States." In short, the Tuscarora Nation's fishing rights on the land in question were wholly contingent on continued ownership of the land by the Seneca. When the Seneca divested themselves of their interest in the land by the Treaty of Big Tree of 1797, the Tuscarora right to free use and enjoyment ended.[6]

The Supreme Court's opinion in *Federal Power Comm'n v Tuscarora Indians Nation* (362 US 99 [1960]) confirms this view. As relevant here, that case addressed the question whether the New York State Power Authority could, pursuant to the Federal Power Act (16 USC § 796, *et seq*), use eminent domain to seize off-reservation land owned by the Tuscarora in fee simple for use in a hydroelectric dam project. Among other things, the

Appendix A

Tuscarora argued that their land, which was situated within the same former Seneca tract as Wilson-Tuscarora State Park, was protected from condemnation by the Treaty of Canandaigua.

In footnote 18 of its opinion, the Supreme Court rejected the Tuscarora's claim. The Court concluded, as do we, that the Treaty of Canandaigua covers the lands in question. Nevertheless, it determined that by conveying these lands pursuant to the Treaty of Big Tree of 1797, the Seneca "freed them from the effects of the Treaty of Canandaigua of 1794" (*id.* at 121 n18). Tracing the history of Tuscarora migration to the Niagara frontier, the Court explained that the Tuscarora interest in the Seneca lands was contingent on Seneca beneficence. The Tuscarora tenure on Seneca lands was, the Court observed, as "guests or tenants at will or by sufferance" (*id.*).

The Treaty of Canandaigua did not transform the Tuscarora's status on Seneca lands: "[b]y the Treaty of Canandaigua of 1794 . . . it was recognized that the Senecas alone had possessory rights to the western New York area here involved" (*id.*). Moreover, any treaty interest the Tuscarora had in Seneca land was terminated by the Treaty of Big Tree of 1797, which, the Supreme Court determined, swept away any Tuscarora treaty rights to lands in Western New York. "[T]he lands in question," the Court noted, "were entirely freed from the effects of all then existing treaties with the Indians" (*id.*). Since the Treaty of Big Tree, the former Seneca lands have "never

since been subject to any treaty between the United States and the Tuscaroras" (*id.*).

Both the Supreme Court's thorough treatment of the subject and our own study of the pertinent language satisfy us that the Tuscarora enjoy no right under the Treaty of Canandaigua to free use and enjoyment of former Seneca lands. Defendant's other contentions are without merit.

Accordingly, the order of County Court should be affirmed.

Order affirmed. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Graffeo, Read and R.S. Smith concur.

Decided June 14, 2005

Footnotes

1 A tip-up is a device, designed to be left unattended, that supports a fishing line suspended through a hole in the ice. When a fish takes the bait, it triggers a flag or other signal to alert the ice fisher.

2 *See also* Missouri v Holland (252 US 416 [1920] ["No doubt the great body of private relations usually fall within

the control of the State, but a treaty may override its power"]).

3 *See Lacoste v Dept of Conservation of State of Louisiana* (263 US 545, 549 [1924] ["The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the state may regulate and control the taking, subsequent use and property rights that may be acquired therein"]).

4 Defendant argues that his invocation of "conservation necessity" doctrine represents a challenge to the jurisdiction of New York courts and that the courts below wrongly treated it as a defense of justification pursuant to Penal Law § 35.05 1) ("conduct which would otherwise constitute an offense is justifiable and not criminal when. . . [s]uch conduct is required or authorized by law"). We need not consider this question. Neither a jurisdictional challenge nor a justification defense can be premised on a nonexistent treaty right.

5 A usufructuary right is a right to "use and enjoy the fruits of another's property for a period without damaging or diminishing it" (Black's Law Dictionary 1580 [8th ed 2004]).

6 The terms of the 1797 Treaty of Big Tree, which followed the Treaty of Canandaigua by three years,

suggest that the express reservation of usufructuary fishing rights was not outside the ken of Native American negotiators in the 1790s. In the Treaty of Big Tree, the Seneca retained for themselves the "privilege of fishing and hunting on the said tract of land hereby intended to be conveyed."

APPENDIX B — TREATY WITH THE SIX NATIONS, 1784.

Oct. 22, 1784. | 7 Stat., 15.

Articles concluded at Fort Stanwix, on the twenty-second day of October, one thousand seven hundred and eighty-four, between Oliver Wolcott, Richard Butler, and Arthur Lee, Commissioners Plenipotentiary from the United States, in Congress assembled, on the one Part, and the Sachems and Warriors of the Six Nations, on the other.

The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection upon the following conditions:

ARTICLE 1.

Six hostages shall be immediately delivered to the commissioners by the said nations, to remain in possession of the United States, till all the prisoners, white and black, which were taken by the said Senecas, Mohawks, Onondagas and Cayugas, or by any of them, in the late war, from among the people of the United States, shall be delivered up.

ARTICLE 2.

The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

Appendix B

ARTICLE 3.

A line shall be drawn, beginning at the mouth of a creek about four miles east of Niagara, called Oyonwayea, or Johnston's Landing-Place; upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly in a direction always four miles east of the carrying-path, between Lake Erie and Ontario, to the mouth of Tehoseroron or Buffaloe Creek on Lake Erie; thence south to the north boundary of the state of Pennsylvania; thence west to the end of the said north boundary; thence south along the west boundary of the said state, to the river Ohio; the said line from the mouth of the Oyonwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claims to the country west of the said boundary, and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, to the United States, for the support of the same.

ARTICLE 4.

The Commissioners of the United States, in consideration of the present circumstances of the Six Nations, and in execution of the humane and liberal views of the United States upon the signing of the above articles, will order goods to be delivered to the said Six Nations for their use and comfort.

Appendix B

Oliver Wolcott, [L. S.]
Richard Butler, [L. S.]
Arthur Lee, [L. S.]

Mohawks:

Onogwendahonji, his x mark, [L. S.]
Touighnatogon, his x mark, [L. S.]

Onondagas:

Oheadarighton, his x mark, [L. S.]
Kendarindgon, his x mark, [L. S.]

Senekas:

Tayagonendagighti, his x mark, [L. S.]
Tehonwaeaghrigagi, his x mark, [L. S.]

Oneidas:

Otyadonenghti, his x mark, [L. S.]
Dagaheari, his x mark, [L. S.]

Cayuga:

Oraghgoanendagen, his x mark, [L. S.]

Tuscaroras:

Appendix B

Ononghsawenghti, his x mark, [L. S.]
Tharondawagon, his x mark, [L. S.]

Seneka Abeal:

Kayenthoghke, his x mark, [L. S.]

Witnesses:

Sam. Jo. Atlee,
Wm. Maclay,
Fras. Johnston,

Pennsylvania Commissioners.

Aaron Hill,
Alexander Campbell,
Saml. Kirkland, missionary,
James Dean,
Saml. Montgomery,
Derick Lane, captain,
John Mercer, lieutenant,
William Pennington, lieutenant,
Mahlon Hord, ensign,
Hugh Peebles.

APPENDIX C — TREATY WITH THE SIX NATIONS, 1789.

Jan. 9. 1789. | 7 Stat., 33.

Articles of a treaty made at Fort Harmar, the ninth day of January, in the year of our Lord one thousand seven hundred and eighty-nine, between Arthur St. Clair, esquire, governor of the territory of the United States of America, north-west of the river Ohio, and commissioner plenipotentiary of the said United States, for removing all causes of controversy, regulating trade, and settling boundaries, between the Indian nations in the northern department and the said United States, of the one part, and the sachems and warriors of the Six Nations, of the other part:

ARTICLE 1.

WHEREAS the United States, in congress assembled, did, by their commissioners, Oliver Wolcott, Richard Butler, and Arthur Lee, esquires, duly appointed for that purpose, at a treaty held with the said Six Nations, viz: with the Mohawks, Oneidas, Onondagas, Tuscaroras, Cayugas, and Senekas, at fort Stanwix, on the twenty-second day of October, one thousand seven hundred and eighty-four, give peace to the said nations, and receive them into their friendship and protection: And whereas the said nations have now agreed to and with the said Arthur St. Clair, to renew and confirm all the engagements and stipulations entered into at the beforementioned treaty at fort Stanwix: and whereas it was then and there agreed, between the

Appendix C

United States of America and the said Six Nations, that a boundary line should be fixed between the lands of the said Six Nations and the territory of the said United States, which boundary line is as follows, viz: Beginning at the mouth of a creek, about four miles east of Niagara, called Ononwayea, or Johnston's Landing Place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly, in a direction always four miles east of the carrying place, between lake Erie and lake Ontario, to the mouth of Tehoseroton, or Buffalo creek, upon lake Erie; thence south, to the northern boundary of the state of Pennsylvania; thence west, to the end of the said north boundary; thence south, along the west boundary of the said state to the river Ohio. The said line, from the mouth of Ononwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claim to the country west of the said boundary; and then they shall be secured in the possession of the lands they inhabit east, north, and south of the same, reserving only six miles square, round the fort of Oswego, for the support of the same. The said Six Nations, except the Mohawks, none of whom have attended at this time, for and in consideration of the peace then granted to them, the presents they then received, as well as in consideration of a quantity of goods, to the value of three thousand dollars, now delivered to them by the said Arthur St. Clair, the receipt whereof they do hereby acknowledge, do hereby renew and confirm the said boundary line in the words beforementioned, to the end that it may be and remain as a

division line between the lands of the said Six Nations and the territory of the United States, forever. And the undersigned Indians, as well in their own names as in the name of their respective tribes and nations, their heirs and descendants, for the considerations beforementioned, do release, quit claim, relinquish, and cede, to the United States of America, all the lands west of the said boundary or division line, and between the said line and the strait, from the mouth of Ononwayea and Buffalo Creek, for them, the said United States of America, to have and to hold the same, in true and absolute propriety, forever.

ARTICLE 2.

The United States of America confirm to the Six Nations, all the lands which they inhabit, lying east and north of the beforementioned boundary line, and relinquish and quit claim to the same and every part thereof, excepting only six miles square round the fort of Oswego, which six miles square round said fort is again reserved to the United States by these presents.

ARTICLE 3.

The Oneida and Tuscarora nations, are also again secured and confirmed in the possession of their respective lands.

ARTICLE 4.

The United States of America renew and confirm the peace and friendship entered into with the Six Nations,

Appendix C

(except the Mohawks), at the treaty beforementioned, held at fort Stanwix, declaring the same to be perpetual. And if the Mohawks shall, within six months, declare their assent to the same, they shall be considered as included.
Done at Fort Harmar, on the Muskingum, the day and year first above written.
In witness whereof, the parties have hereunto, interchangeably, set their hands and seals.

Ar. St. Clair, [L. S.]
Cageaga, or Dogs Round the Fire, [L. S.]
Sawedowa, or The Blast, [L. S.]
Kiondushowa, or Swimming Fish, [L. S.]
Oncahye, or Dancing Feather, [L. S.]
Sohaeas, or Falling Mountain, [L. S.]
Otachsaka, or Broken Tomahawk, his x mark, [L. S.]
Tekahias, or Long Tree, his x mark, [L. S.]
Onecnsetee, or Loaded Man, his x mark, [L. S.]
Kiahtulaho, or Snake, [L. S.]
Aqueia, or Bandy Legs, [L. S.]
Kiandogewa, or Big Tree, his x mark, [L. S.]
Owenewa, or Thrown in the Water, his x mark, [L. S.]
Gyantwaia, or Cornplanter, his x mark, [L. S.]
Gyasota, or Big Cross, his x mark, [L. S.]
Kannassee, or New Arrow, [L. S.]
Achiout, or Half Town, [L. S.]
Anachout, or The Wasp, his x mark, [L. S.]
Chishekoa, or Wood Bug, his x mark, [L. S.]
Sessewa, or Big Bale of a Kettle, [L. S.]
Sciahowa, or Council Keeper, [L. S.]

Appendix C

Tewanias, or Broken Twig, [L. S.]
Sonachshowa, or Full Moon, [L. S.]
Cachunwasse, or Twenty Canoes, [L. S.]
Hickonquash, or Tearing Asunder, [L. S.]

In presence of—

Jos. Harmar, lieutenant-colonel commanding First U. S. Regiment and brigadier-general by brevet,
Richard Butler,
Jno. Gibson,
Will. M'Curdy, captain,
Ed. Denny, ensign First U. S. Regiment,
A. Hartshorn, ensign,
Robt. Thompson, ensign, First U. S. Regiment,
Fran. Leile, ensign,
Joseph Nicholas.

SEPARATE ARTICLE.

Should a robbery or murder be committed by an Indian or Indians of the Six Nations, upon the citizens or subjects of the United States, or by the citizens or subjects of the United States, or any of them, upon any of the Indians of the said nations, the parties accused of the same shall be tried, and if found guilty, be punished according to the laws of the state, or of the territory of the United States, as the case may be, where the same was committed. And should any horses be stolen, either by the Indians of the said nations, from the citizens or subjects of the United

Appendix C

States, or any of them, or by any of the said citizens or subjects from any of the said Indians, they may be reclaimed into whose possession soever they may have come; and, upon due proof, shall be restored, any sale in open market notwithstanding; and the persons convicted shall be punished with the utmost severity the laws will admit. And the said nations engage to deliver the persons that may be accused, of their nations, of either of the beforementioned crimes, at the nearest post of the United States, if the crime was com-mitted within the territory of the United States; or to the civil authority of the state, if it shall have happened within any of the United States.

Ar. St. Clair.

APPENDIX D — TREATY WITH THE SIX NATIONS, 1794.

Nov. 11, 1794. | 7 Stat., 44. | Proclamation, Jan. 21, 1795.

A Treaty between the United States of America, and the Tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

ARTICLE 1.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE 2

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective

treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE 3.

The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the north-west corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yōng-wong-yeh Creek, at Johnson's Landing-place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's creek, which empties into the river Niagara, above fort Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line, from the mouth of O-yōng-wong-yeh Creek to the river Niagara, above fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneka nation ceded to the King of Great-Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the north-east corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the

Appendix D

President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the south-west corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelps's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE 4.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

Appendix D

ARTICLE 5.

The Seneka nation, all others of the Six Nations concurring, cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffaloe Creek; and the people of the United States shall have the free and undisturbed use of this road, for the purposes of travelling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE 6.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred

dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE 7.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

Appendix D

NOTE. It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In witness whereof, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four.

Timothy Pickering, [L. S.]
Onoyeahnee, his x mark, [L. S.]
Konneatorteeooh, his x mark, or Handsome Lake, [L. S.]
Tokenhyouhau, his x mark, alias Captain Key, [L. S.]
Oneshauee, his x mark, [L. S.]
Hendrick Aupaumut, [L. S.]
David Neesoonhuk, his x mark, [L. S.]
Kanatsoyh, alias Nicholas Kusik, [L. S.]
Sohhonteoquent, his x mark, [L. S.]
Ooduhtsait, his x mark, [L. S.]
Konoohqung, his x mark, [L. S.]
Tossonggaulolus, his x mark, [L. S.]
John Skenendoa, his x mark, [L. S.]
Oneatorleeooh, his x mark, [L. S.]

Appendix D

Kussauwatau, his x mark, [L. S.]
Eyootenyootauook, his x mark, [L. S.]
Kohnyeaugong, his x mark, alias Jake Stroud, [L. S.]
Shaguiesa, his x mark, [L. S.]
Teeroos, his x mark, alias Captain Prantup, [L. S.]
Sooshaoowau, his x mark, [L. S.]
Henry Young Brant, his x mark, [L. S.]
Sonhyoowauna, his x mark, or Big Sky, [L. S.]
Onaahhah, his x mark, [L. S.]
Hotoshahenh, his x mark, [L. S.]
Kaukondanaiya, his x mark, [L. S.]
Nondiyauka, his x mark, [L. S.]
Kossishtowau, his x mark, [L. S.]
Oojaugenta, his x mark, or Fish Carrier, [L. S.]
Toheonggo, his x mark, [L. S.]
Ootaguasso, his x mark, [L. S.]
Joonondauwaonch, his x mark, [L. S.]
Kiyauhaonh, his x mark, [L. S.]
Ootaujeaugenh, his x mark, or Broken Axe, [L. S.]
Tauhoondos, his x mark, or Open the Way, [L. S.]
Twaukewasha, his x mark, [L. S.]
Sequidongquee, his x mark, alias Little Beard, [L. S.]
Kodjeote, his x mark, or Half Town, [L. S.]
Kenjauaugus, his x mark, or Stinking Fish, [L. S.]
Soonohquaukau, his x mark, [L. S.]
Twenniyana, his x mark, [L. S.]
Jishkaaga, his x mark, or Green Grasshopper, alias Little Billy, [L. S.]
Tuggehshotta, his x mark, [L. S.]
Tehongyagauna, his x mark, [L. S.]

Appendix D

Tehongyoowush, his x mark, [L. S.]
Konneyoowesot, his x mark, [L. S.]
Tioohquottakauna, his x mark, or Woods on Fire, [L. S.]
Taoundaudeesh, his x mark, [L. S.]
Honayawus, his x mark, alias Farmer's Brother, [L. S.]
Soggooyawauthau, his x mark, alias Red Jacket, [L. S.]
Konyootiayoo, his x mark, [L. S.]
Sauhtakaongyees, his x mark, or Two Skies of a length, [L. S.]
Ounnashattakau, his x mark, [L. S.]
Kaungyanehquee, his x mark, [L. S.]
Sooayoowau, his x mark, [L. S.]
Kaujeagaonh, his x mark, or Heap of Dogs, [L. S.]
Soonoohshoowau, his x mark, [L. S.]
Thaoowaunias, his x mark, [L. S.]
Soonongjoowau, his x mark, [L. S.]
Kiantwhauka, his x mark, alias Cornplanter, [L. S.]
Kaunehshonggoo, his x mark, [L. S.]

Witnesses:

Israel Chapin.
William Shepard, jr.
James Smedley.
John Wickham.
Augustus Porter.
James K. Garnsey.
William Ewing.
Israel Chapin, jr.
Horatio Jones,

Appendix D

Joseph Smith,
Jasper Parish,
Interpreters.
Henry Abeele.

APPENDIX E — AGREEMENT WITH THE SENECA, 1797.

Sept. 15, 1797. | 7 Stat., 601.

Contract entered into, under the sanction of the United States of America, between Robert Morris and the Seneca nation of Indians.

This indenture, made the fifteenth day of September, in the year of our Lord one thousand seven hundred and ninety-seven, between the sachems, chiefs, and warriors of the Seneca nation of Indians, of the first part, and Robert Morris, of the city of Philadelphia, Esquire, of the second part: Whereas the Commonwealth of Massachusetts have granted, bargained, and sold unto the said Robert Morris, his heirs and assigns forever, the pre-emptive right, and all other the right, title and interest which the said Commonwealth had to all the tract of land hereinafter particularly mentioned, being part of a tract of land lying within the State of New York, the right of pre-emption of the soil whereof, from the native Indians, was ceded and granted by the said State of New York, to the said Commonwealth: and whereas, at a treaty held under the authority of the United States, with the said Seneca nation of Indians, at Genesee, in the county of Ontario, and State of New York, on the day of the date of these presents, and on sundry days immediately prior thereto, by the Honorable Jeremiah Wadsworth, Esquire, a commissioner appointed by the President of the United States, to hold the same in pursuance of the constitution, and of the act of the

Appendix E

Congress of the United States, in such case made and provided, it was agreed, in the presence and with the approbation of the said commissioner, by the sachems, chiefs and warriors of the said nations of Indians, for themselves and in behalf of their nation, to sell to the said Robert Morris, and to his heirs and assigns forever, all their right to all that tract of land above recited, and hereinafter particularly specified, for the sum of one hundred thousand dollars, to be by the said Robert Morris vested in the stock of the bank of the United States, and held in the name of the President of the United States, for the use and behoof of the said nation of Indians, the said agreement and sale being also made in the presence, and with the approbation of the honorable William Shepard, Esquire, the superintendent appointed for such purpose, in pursuance of a resolve of the General Court of the Commonwealth of Massachusetts, passed the eleventh day of March, in the year of our Lord one thosuand seven hundred and ninety-one; now this indenture witnesseth, that the said parties, of the first part, for and in consideration of the premises above recited, and for divers other good and valuable considerations them thereunto moving, have granted, bargained, sold, aliened, released, enfeoffed, and confirmed; and by these presents do grant, bargain, sell, alien, release, enfeoff, and confirm, unto the said party of the second part, his heirs and assigns forever, all that certain tract of land, except as is hereinafter excepted, lying within the county of Ontario and State of New York, being part of a tract of land, the right of pre-emption whereof was ceded by the state of New York to

the Commonwealth of Massachusetts, by deed of cession executed at Hartford, on the sixteenth day of December, in the year of our Lord one thousand seven hundred and eighty-six, being all such part thereof as is not included in the Indian purchase made by Oliver Phelps and Nathaniel Gorham, and bounded as follows, to wit: easterly, by the land confirmed to Oliver Phelps and Nathaniel Gorham by the legislature of the Commonwealth of Massachusetts, by and act passed the twenty-first day of November, in the year of our Lord one thousand seven hundred and eighty-eight; southerly, by the north boundary line of the State of Pennsylvania; westerly, partly by a tract of land, part of the land ceded by the State of Massachusetts to the United States, and by them sold to Pennsylvania, being a righ' angled triangle, whose hypothenuse is in or along the shore of Lake Erie; partly by Lake Erie, from the northern point of that triangle to the Southern bounds of a tract of land a mile in width, lying on and along the east side of the strait of Niagara, and partly by the said tract to lake Ontario; and on the north, by the boundary line between the United States and the King of Great Britain; excepting, nevertheless, and reserving always out of this grant and conveyance, all such pieces or parcels of the aforesaid tract, and such privileges thereunto belonging as are next hereinafter mentioned, which said pieces or parcels of land so excepted are, by the parties to these presents, clearly and fully understood to remain the property of the said parties of the first part, in as full and ample manner as if these presents had not been executed; that is to say, excepting and reserving to them, the said parties of the

Appendix E

first part, and their nation, one piece or parcel of the aforesaid tract, at Canawaugas, of two square miles, to be laid out in such manner as to include the village extending in breadth one mile along the river; one other piece or parcel at Big Tree, of two square miles, to be laid out in such manner as to include the village, extending in breadth along the river one mile; one other piece or parcel of two square miles at Little Beard's town, extending one mile along the river, to be laid off in such manner as to include the village; one other tract of two square miles at Squawky Hill, to be laid off as follows, to wit: one square mile to be laid off along the river, in such manner as to include the village, the other directly west thereof and contiguo's thereto; one other piece or parcel at Gardeau, beginning at the mouth of Steep Hill creek, thence due east until it strikes the old path, thence south until a due west line will intersect with certain steep rocks on the west side of Genesee river, then extending due west, due north and due east, until it strikes the first mentiones bound, enclosing as much land on the west side as on the east side of the river. One other piece or parcel at Kaounadeau extending in length eight miles along the river and two miles in breadth. One other piece or parcel at Cataraugos, beginning at the mouth of the Eighteen mile or Koghquaugu creek, thence a line or line to be drawn parallel to lake Erie, at the distance of one mile from there, to the mouth of Cataraugos creek, thence a line or lines extending 12 miles up the north side of said creek at the distance of one mile thereform, thence a direct line to the said creek, thence down the said creek to lake Erie, thence

along the lake to the first mentioned creek, and thence to the place of beginning. Also one other piece at Cataraugos, beginning at the shore of lake Erie, on the south side of Cataraugos creek, at the distance of one mile from the mouth thereof, thence running one mile from the lake, thence on a line parallel thereto, to a point within one mile from the Connondauweyea creek, thence up the said creek one mile, on a line parallel thereto, thence on a direct line to the said creek, thence down the same to lake Erie, thence along the lake to the place of beginning. Also one other piece or parcel of forty-two square miles, at or near the Allegenny river. Also, two hundred square miles, to be laid off partly at the Buffalo and partly at the Tonnawanta creeks. Also, excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed. And it is hereby understood by and between the parties to these presents, that all such pieces or parcels of land as are hereby reserved and are not particularly described as to the manner in which the same are to be laid off, shall be laid off in such manner as shall be determined by the sachems, chiefs, residing at or near the respective villages where such reservations are made, a particular note whereof to be indorsed on the back of this deed, and recorded therewith, together with all and singular the rights, privileges, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining. And all the estate, right, title, and interest, whatsoever, of them the said parties of the first part and their nation, of, in, and to the said tract of land

above described, except as is above excepted, to gave and to hold all and singular the said granted premises, with the appurtenances to the said party of the second part, his heirs and assigns, to his and their proper use, benefit and behoof forever.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

Robert Morris, by his attorney, Thomas Morris, [L. S.]
Koyengquahtah, alias Young King, his x mark, [L. S.]
Soonookshewan, his x mark, [L. S.]
Konutaico, alias Handsome Lake, his x mark, [L. S.]
Sattakanguyase, alias Two Skies of a length, his x mark, [L. S.]
Onayawos, or Farmer's Brother, his x mark, [L. S.]
Soogooyawautau, alias Red Jacket, his x mark, [L. S.]
Gishkaka, alias Little Billy, his x mark, [L. S.]
Kaoundoowana, alias Pollard, his x mark, [L. S.]
Ouneashataikau, or Tall Chief, by his agent, Stevenson, his x mark, [L. S.]
Teahdowainggua, alias Thos. Jemison, his x mark, [L. S.]
Onnonggaiheko, alias Infant, his x mark, [L. S.]
Tekonnondee, his x mark, [L. S.]
Oneghtaugooau, his x mark, [L. S.]
Connawaudeau, his x mark, [L. S.]
Taosstaiefi, his x mark, [L. S.]
Koeentwahka, or Corn Planter, his x mark, [L. S.]

Appendix E

Oosaukaunendauki, alias to Destroy a Town, his x mark, [L. S.]
Sooeoowa, alias Parrot Nose, his x mark, [L. S.]
Toonahookahwa, his x mark, [L. S.]
Howwennounew, his x mark, [L. S.]
Kounahkaetoue, his x mark, [L. S.]
Tauuyaukauna, his x mark, [L. S.]
Woudougoohkta, his x mark, [L. S.]
Sonauhquaukau, his x mark, [L. S.]
Twaunauiyana, his x mark, [L. S.]
Takaunoudea, his x mark, [L. S.]
Shequinedaughque, or Little Beard, his x mark, [L. S.]
Jowaa, his x mark, [L. S.]
Saunajee, his x mark, [L. S.]
Tauoiyuquatakausea, his x mark, [L. S.]
Taoundaudish, his x mark, [L. S.]
Tooauquinda, his x mark, [L. S.]
Ahtaou, his x mark, [L. S.]
Taukooshoondakoo, his x mark, [L. S.]
Kauneskanggo, his x mark, [L. S.]
Soononjuwau, his x mark, [L. S.]
Tonowauiya, or Captain Bullet, his x mark, [L. S.]
Jaahkaaeyas, his x mark, [L. S.]
Taugihshauta, his x mark, [L. S.]
Sukkenjoonau, his x mark, [L. S.]
Ahquatieya, or Hot Bread, his x mark, [L. S.]
Suggonundau, his x mark, [L. S.]
Taunowaintooh, his x mark, [L. S.]
Konnonjoowauna, his x mark, [L. S.]
Soogooeyandestak, his x mark, [L. S.]

Appendix E

Hautwanauekkau, by Young King, his x mark, [L. S.]
Sauwejuwan, his x mark, [L. S.]
Kaunoohshauwen, his x mark, [L. S.]
Taukonondaugekta, his x mark, [L. S.]
Kaouyanoughque, or John Jemison, his x mark, [L. S.]
Hoiegush, his x mark, [L. S.]
Taknaahquau, his x mark, [L. S.]

Sealed and delivered in presence of

Nat. W. Howell,
Joseph Ellicott,
Israel Chapin,
James Rees,
Henry Aaron Hills,
Henry Abeel,
Jaspar Parrish,
Horatio Jones,

Interpreters.

Done at a full and general treaty of the Seneka nation of Indians, held at Genesee, in the county of Ontario, and State of New York, on the fifteenth day of September, in the year of our Lord one thousand seven hundred and ninety-seven, under the authority of the United States.

In testimony whereof, I have hereunto set my hand and seal, the day and year aforesaid.

Appendix E

Jere. Wadsworth, [L. S.]

Pursuant to a resolution of the legislature of the Commonwealth of Massachusetts, passed the eleventh day of March, in the year of our Lord one thousand seven hundred and ninety-one, I have attended a full and general treaty of the Seneka nation of Indians, at Genesee, in the county of Ontario, when the within instrument was duly executed in my presence by the sachems, chiefs, and warriors of the said nation, being fairly and properly understood and transacted by all the parties of Indians concerned, and declared to be done to their universal satisfaction: I therefore certify and approve of the same.

William Shepard.
Subscribed in presence of
Nat. W. Howell.

No. _____

IN THE

Supreme Court of the United States

NEIL PATTERSON, JR.,

Petitioner,

v.

NEW YORK,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Thomas P. Schlosser*
Rob Roy Smith
MORISSET, SCHLOSSER, JOZWIAK & MCGAW
801 Second Ave., Ste. 1115
Seattle, WA 98104-1509
(206) 386-5200

**Counsel of Record for Petitioner*

APPENDIX F — NIAGARA COUNTY COURT DECISION AND ORDER

STATE OF NEW YORK
COUNTY OF NIAGARA

NIAGARA COUNTY COURT

PEOPLE OF THE STATE OF NEW YORK,

vs.

APPEAL TO COUNTY COURT FROM THE TOWN OF WILSON COURT Index No. 16086

NEIL PATTERSON, Jr.
Defendant.

DECISION and ORDER

SPERRAZZA, J.

The defendant/ appellant is a member of the Tuscarora Indian Nation, which is one of the Six Nations of the Iroquois Confederacy or Haudenosaunee. On February 9, 2003 the defendant was ice fishing in Wilson Tuscarora State Park where he was observed by

Appendix F

Environmental Conservation Officer Richard Lang. Officer Lang noticed that the defendant did not have an identifying tag on his ice fishing rig, or tip-up. The lack of an identifying tag on a tip-up is a violation of 6 N.Y.C.R.R. § 10.4-7. Officer Lang issued a citation, returnable in the Wilson Town Court. The defendant pled not guilty and requested a trial.

At the trial of the matter, Officer Lang, who prosecuted the case, testified as to his observations and the lack of an identifying tag on the defendant's tip-up.

The defendant responded that it was his belief that the State does not have jurisdiction over aboriginal territory and that State Conservation Law may be applied to Native Americans off their reservation only when the law's purpose is "preserving conservation of resource."

Officer Lang responded that when off the reservation, Native Americans must follow the rules enacted. He cited a memorandum of his department which states that Native Americans are to comply with all laws and regulations regarding seasons, bag limits and size limits. Lang further argued that the subject regulation has as its purpose the conservation of resource.

The defendant supplied to the court a case decision and two treatise citations, which are not contained in the court record, reportedly relating to the limits imposed upon the state's power to regulate Native American hunting and

fishing rights. The defendant stated that his actions were guaranteed by the "Treaty of Canandaigua in 1794" (hereafter "Treaty of 1794"). Lang responded that the regulation applies to all individuals within the state.

The court ruled that the defendant had violated the statute and fined him $25.00. The defendant has appealed the judgment of the lower court.

In his Affidavit of Errors filed pursuant to Criminal Procedure Law § 460.10, the defendant cites two defects in the ruling of the court which are the subject of his appeal. First, the defendant argues that the court did not correctly apply the doctrine of "conservation necessity" which limits state enforcement of conservation regulations against Native Americans exercising treaty hunting and fishing rights. The defendant also contends that the guidelines put forth by the Department of Environmental Conservation, Division of Law Enforcement, which state that Native Americans must comply with "legally established seasons, bag limits and size limits", meant that it was the policy of the Department to not apply the regulation requiring an identifying tag on tip-ups to Native Americans.

In his brief on appeal, the defendant argues that he was exercising rights guaranteed by The Treaty of 1794 to fish at Wilson Tuscarora State Park. As such, any state regulation which limits his fishing rights would only be lawful, as applied to him, if the People could show that the

regulation itself was reasonable and necessary to conservation and that its application to Native Americans was also necessary for conservation. Further, the defendant agues that it is the People's burden to show the necessity of the regulation in question. The defendant cites a number of cases supporting this position (Tulee v. State of Washington, 668 U.S. 681; Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392; United States v. Washington, 384 F. Supp 312, aff'd 520 F.2nd 676; Antoine v. Washington, 420 U.S. 194). The defendant contends that the failure of the court to apply this rule of law was a failure of constitutional dimensions in that it violated the Supremacy Clause of the United States Constitution.

Upon review of the cited cases, the Court agrees that the conservation necessity doctrine, if applicable in this case, would place upon the People at trial the burden of showing that the regulation passed the standard set by the Supreme Court. However, for this doctrine to be applicable in this case, the defendant, who was not on a reservation, must have been exercising rights guaranteed to him by treaty. The initial burden therefore is upon the defendant to establish that he is a Native American exercising rights established under a treaty.

In his brief, the defendant argues that the issue is one of subject matter jurisdiction. However, the Wilson Town Court does have jurisdiction to hear criminal cases regarding violations of the state environmental

conservation regulations against any person, including Native Americans. Rather, the issue raised by the defendant is in the nature of a defense under Penal Law § 35.05(1) in that the defendant is conceding that he did the act but is asserting that his conduct was authorized by law or a judicial decree, i.e. the law of conservation necessity.

The Court has framed this question in the context of a defense raised by the defendant pursuant to Penal Law § 35.05-1 and the Court is aware of the obligation placed upon the People by Penal Law § 25.00 to disprove a defense beyond a reasonable doubt. To establish a defense to which the People must respond, the defendant must at least present sufficient evidence from which it would be reasonable to conclude that the defense may apply. The defendant here has fallen short of that requirement.

The defendant stated at trial the he was exercising rights pursuant to the Treaty of 1794. However, according to the record on appeal, the defendant did not present the Treaty to the court, nor did he present any evidence that the area where he was fishing was included within the Treaty. This Court has examined the Treaty of 1794 and, without a map or some historical context not contained in the trial record, could not make a determination from the face of the Treaty that the Wilson Tuscarora State Park was land within the area delineated by the Treaty. For example, the Treaty of 1794 gives the property description for the relevant land in Article III as "*The land of the*

Appendix F

Seneca nation is bounded as follows: beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps, the land runs westerly along the lake, as far as O-yon-won-yeh Creek, at Johnson's landing place . . . ." It is certainly not apparent to the Court, from this description, that this land includes present day Wilson Tuscarora State Park.

The defendant argues that his treaty fishing rights arise from the language in Article III as follows: "*Now the United States acknowledge all the land within the aforementioned boundaries to be the property of the Seneca nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.*"

The defendant claims rights under this Treaty but his tribe is not mentioned by name and again, it takes some historical knowledge, outside of the proof presented by the defendant, to recognize that the Tuscarora Tribe was one of the Six Nations of the Iroquois and that the land in question is that mentioned in Article III of the Treaty of 1794.

The area where he was fishing is obviously no longer tribal land so there must have been some

intervening transaction which caused this land to be the public property of the State of New York. The defendant presented no proof to the court as to the nature of that transaction or that the right to "free use and enjoyment" of the land survived the transaction.

The defendant presented no proof that his tribe resided in the area at the time of the execution of the treaty or that it was their custom and practice at the time to fish in the area that is presently Wilson Tuscarora State Park. He presented no evidence that his tribe had aboriginal history or rights in the area.

Were the defendant's statements made in this trial deemed sufficient to raise the defense that his otherwise unlawful actions were authorized by law or judicial decree, then any person charged with a violation of such a regulation could appear in court, claim membership in a tribe, announce the existence of a treaty which purportedly granted him rights, and thereby place a burden of proof upon the People. Based upon the unsupported claim of the defendant, the People would have to prove, beyond a reasonable doubt, that the defendant was not a member of the tribe, or that the treaty did not grant the rights claimed, or that the tribe had not historically fished at that location, or that the treaty did not apply to the land in question. The unfairness of such a position is obvious, for which reason the Court finds it proper that the defendant raising such a defense present reasonable evidence in support of his position.

Appendix F

On the record below, the Court does not find that the defendant put forward sufficient proof from which it could be reasonably concluded that he was exercising rights guaranteed to his tribe under a treaty. Therefore, the defense was not established and the State was not placed under the burden of proving that the regulation was necessary for conservation purposes.

This Court would reach a different conclusion if there was legal precedent dealing with the Tuscarora Tribe which established the existence of their treaty fishing rights at the location under the Treaty of 1794, or some other treaty. Then, it would be sufficient for the defendant to appear in court and cite his status as a Tuscarora. However, the burden was on the defendant, in this case of first impression, to present some proof of the existence of such rights.

Upon this line of reasoning, the Court finds that the defendant, who admitted the act in question and did not raise a viable defense, was properly convicted of the offense charged.

Were this Court to find that the defendant had sufficiently raised the defense, we would nonetheless find that the People had disputed it by the contention of the conservation officer that the regulation applies to the defendant off the reservation. Then the question before the trial court would have been- Did the defendant have usufructory fishing rights pursuant to the Treaty of 1794?

Appendix F

It appears that the lower court answered this question in the negative. In the court's return, in response to the Affidavit of Errors, the court stated that the conservation necessity doctrine raised issues which the court felt were not applicable to the case and that the defendant must comply with the charged regulation, as well as other rules and regulations, while off reservation land.

This Court finds that the lower court's ruling was correct as a matter of law. In reaching this determination, the Court has examined several cases which have dealt with the Treaty of 1794 and its background. Some of these cases set out an extensive exposition, based upon the factual records made before those courts, of the history of the Native American population of Western New York from earliest times up to and beyond the time of the Treaty (see, Seneca Nation of Indians v. State of New York, et al, 206 F. Supp. 2nd 408; People ex rel. Kennedy v. Becker, 215 N.Y. 2d 881, aff'd 36 S. Ct. 705; Tuscarora Nation of Indians v. Power Authority of the State of New York, 164 F. Supp. 107; Federal Power Commission v. Tuscarora Indian Nation,326 U.S. 99, 80 S.Ct. 543, 4 L. Ed 2nd 584).

The Court finds that it must follow the reasoning and ruling of the Supreme Court in Federal Power Commission v. Tuscarora Indian Nation, *supra*. The Court noted there that the Tuscarora were recent inhabitants of the area at the time of the treaty, having moved from North Carolina within the previous fifty

years. They had no aboriginal interest in the area but were tenants at sufferance of the Seneca. The Court interpreted the Treaty as recognizing that the Seneca alone had title to the Western New York area and that the land was sold by the Seneca to Robert Morris pursuant to the Treaty of Big Tree of 1797. The Court stated that, by the terms of this Treaty and sale, the "lands were entirely freed from the effects of all then existing treaties with the Indians . . ." (326 U. S. at p. 121, n. 18). The Court in that case was not dealing with Wilson Tuscarora State Park but with nearby lands actually owned and held in fee by the Tuscarora, which the government wished to take for a power project. The Court held that the lands in question are not subject to any treaty between the United States and the Tuscarora (at p. 123). From this ruling, it naturally flows that the land which is now Wilson Tuscarora State Park would also be held free from any treaty with the Tuscarora. In Tuscarora Nation Indians v. Power Authority of the State of New York, 164 F. Supp. 107, the District Court stated that "the original right of Indian occupancy and the pre-emptive rights in the lands now occupied by the plaintiff were actually extinguished by the Treaty of 'Big Tree.'" (at p. 112).

The Court is aware that the rule of treaty construction is that any ambiguities should be resolved in favor of the Native Americans and that the treaty should be interpreted in the way in which it would have been understood by the signatories at the time (Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753,

Appendix F

766, 105 S.Ct. 3420, 3428, 87 L.Ed.2d 542 (1985); People ex rel. Kennedy v. Becker, 241 U.S. 556, 36 S. Ct. 705, 60 L. Ed. 1166). This rule developed so that the "more sophisticated" party would not take advantage of the Native Americans in their dealings. In this case, some of the historical reading indicates that the Indians, led by Red Jacket, may have been the shrewder, more persistent bargainers (Seneca Nation of Indians v. New York State, 206 F. Supp. 2d 408 at 483, et seq.).

It appears to this Court, in light of the historical context, that the language of the Treaty of 1794 is clear and unambiguous. The purpose of Article III of the treaty of 1794 was to deal with the Seneca Nation and to secure to that Nation their property rights in the area of Western New York, in return for peace (see generally, Seneca Nation of Indians v. State of New York, 206 F. Supp. 2d 408 at 483, et seq.). The relevant portion of the Treaty of 1794 is: "*Now the United States acknowledge all the land within the aforementioned boundaries to be the property of the Seneca nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.*"

The clear language of the treaty, read as a contract or agreement between the parties, was that the Seneca and

the other Six Nations could own, use, and enjoy the land, until the Seneca chose to sell it. The Tuscarora were tenants at sufferance of the Seneca, that is, their guests, and their right to the land would have terminated when their host sold the land. There is no reading of the Treaty which could be interpreted to mean that the right to possession or use of the land by the Seneca would continue should they choose to sell it outright. Nor is there any ambiguity which would have led the "guests" to believe their rights to be greater under the Treaty than that of their hosts. The defendant has presented no evidence that the Tuscarora believed any differently at the time of the Treaty. It is only reasonable to conclude that the Tuscarora, having recently been driven from their ancestral home by white settlers and arriving in this State, would certainly be aware that their use and enjoyment of the land was at the sufferance and pleasure of the Seneca, and could be revoked by the Seneca at will.

The defendant would argue that, based upon the development of the law in this area (Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753; Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U. S. 172), the usufructory rights of the Tuscarora would have continued until extinguished by the Tuscarora in another treaty. However, unlike the cited cases, the Tuscarora had no relationship to this land independent of their relationship with the Seneca. The Treaty of 1794 clearly states that this was Seneca land. There is no evidence that the Tuscarora at the time believed their right

to use of the land would continue if it was sold. They may have expected the land would never be sold by the Seneca, but the Treaty gave them no illusions as to the consequences of a sale.

Neither can it be said that the Native Americans of the time would have thought that an outright sale of the land would not affect their use and enjoyment of the fruits of the land. When the Seneca did sell the land pursuant to the Treaty of Big Tree of 1797, a provision was made as follows: "*Also, excepting and reserving to them, the said parties of the first part and their heirs* (the Seneca), *the privilege of hunting and fishing on the said tract of land hereby intended to be conveyed.*" The Treaty of 1797 was with the Seneca Nation alone. The Seneca knew the necessary language to preserve their hunting and fishing rights and used such language to reserve certain privileges for themselves, but not the other members of the Six Nations.

The court therefore finds that the ruling of the lower court, that the doctrine of conservation necessity was not applicable, was correct as a matter of law.

The defendant also argues in his Affidavit of Errors that the court failed to properly interpret the rules of the State DEC Guidelines. The defendant cites a memorandum of that department which states that "Native Americans fishing off the reservation must comply with all

laws and regulations regarding seasons, bag limits and size limits."

However, the context of this memorandum was that the officer of the DEC was addressing the issue of whether Native Americans were required to obtain fishing licenses. The memorandum cited an earlier letter from the Commissioner of the DEC to the Oneida in which Commissioner Jorling wrote "We do not agree, however, that the right to hunt and fish off Reservation lands also conveys the right to do so outside of legally established seasons, bag limits and size limits."

Taken in this context, it does not appear that the intent in this memorandum was to set as a policy of the DEC that only laws and regulations regarding seasons, bag limits and size limits were to be applied to Native Americans. Such a policy would be contrary to the clear language of 6 N.Y.C.R.R. 10.4 which states that it is applicable to all persons.

The decision of the lower court is affirmed. This constitutes the decision and order of the court.

/s

Hon. Sara S. Sperrazza
Niagara County Court Judge

Entered: /s

APPENDIX G — LETTER FROM ROBERT J. BOTZER RE APPEAL TO COUNTY COURT FROM WILSON TOWN COURT

Town of Wilson Justice Court
375 Lake Street
P.O. Box 537
Wilson, NY 14172

716) 751-0549

ROBERT J. BOTZER
Town Justice

May 23, 2003

Mr. Robert Graff, Principal Law Clerk
Niagara County Court House
1755 Hawley Street
Lockport, NY 14094

RE: Appeal to County Court from Wilson Town Court
People v. Neil Patterson, Jr.
Docket No. 03020023

Dear Mr. Graff:

In processing the appeal that I have rewritten my notes from the trial that was held on March 26, 2003 (enclosed). Also enclosed are copies of three sheets that officer Lang referenced at trial.

I received the attached Affidavit of Errors on May 21, 2003. In answer to the two issues of errors referenced in the affidavit, I make the following comments:

Appendix G

(a) No specific written "Doctrine of Conservation Necessity" was provided to this court at trial. Mr. Patterson's espousal of the doctrine of "Conservation Necessity" raised positions which I felt were not applicable to this case.

(b) NYCRR 10.4(7) requires all tip ups be marked with the name and address of operator. It is the opinion of this court that Mr. Patterson must comply with this regulation as well as all other rules and regulations while off reservation land, including the "legally established seasons, bag limits, and size limits."

If you require any further information, please do not hesitate to call. My clerk or I can be reached at (716) 751-0549.

Sincerely,

/s
Robert J. Botzer
Town Justice

Appendix G

Rewritten notes from Trial People Vs. Patterson 03/26/03

Mr. Neil Patterson requested to represent himself. He had no witnesses.

Officer Richard Lang prosecuted for the People.

Both Officer Lang and Mr. Patterson were sworn in and testified under oath.

Officer Lang – Testified that he found an individual in Wilson Tuscarora State Park ice fishing with a tip up lacking name and address on it. This individual also lacked a fishing license but was not issued a ticket because he was an American Indian.

Mr. Patterson – Testified that he is director of the Tuscarora Environment program on the Nation. States he was fishing with 1 tip up and one other line. Nation attorney has informed him that it was argued successfully that the state does not have jurisdiction over aboriginal territory. Conservation law only pertains to off reservation Native Americans when "preserving conservation of resource."

Officer Lan Disputes Mr. Patterson's statement that rules can be broken off the reservation. Once off the reservation the Native American must follow the rules outlined by the April 6, 2002 memo as presented in court. Specifically cited was the last sentence "Native Americans

hunting and fishing off the reservation are required to comply with all laws and regulations regarding seasons, bag limits and size limits."

Mr. Patterson – States that the state does have the right but only to "preserving conservation of resource". He states, "Therefore, this memo backs up my argument". He states, "There is inconsistent policy with the state".

Officer Lang – Disagrees – Rules for tip up do include the conservation of resource. It could be used in the illegal taking of the resource (if the name and address were not placed on all the tip ups). Officer Lang asked Mr. Patterson if he had a copy of the New York State Fishing Regulations Guide and he did not. Officer Lang provided copies of the guide to the court and Mr. Patterson. Highlighted the section that states, "All tip ups must be marked with the name and address of the operator."

Mr. Patterson – Provided the court 3 documents (one appeals court decision and two sections of American Jurisprudence, second edition) outlining the states limitation of power to regulate American Indians' right to hunt and fish. Mr. Patterson states that this issue is not a violation of any section of Environmental Conservation Law, that his actions were guaranteed by the "Treaty of Canandaigua in 1794".

Officer Lang – States the law does not discriminate; it is the same for all individuals.

Appendix G

Decision: Mr. Patterson violated CRR 10.4 Sec. A7 by not having name and address on his tip up.

Fine = $25.00

Mr. Patterson said he would pay by "next week".
Approved by Wilson Town Court

No. 05-550

IN THE

Supreme Court of the United States

NEIL PATTERSON, JR.,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF IN OPPOSITION

ELIOT SPITZER
Attorney General of the State of New York
MATTHEW J. MURPHY III
Niagara County District Attorney

ANDREW D. BING
Special Assistant District Attorney
Assistant Solicitor General
New York State Office of the Attorney General
120 Broadway
New York, New York 10271
(212) 416-8016

THOMAS H. BRANDT
Assistant District Attorney
Niagara County Courthouse
Lockport, New York 14094
(716) 439-7085

Co-Counsel for Respondent State of New York

CAITLIN J. HALLIGAN
Solicitor General and Counsel of Record

DANIEL SMIRLOCK
Deputy Solicitor General

PETER H. SCHIFF
Senior Counsel

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether New York State can enforce its ice fishing regulations against a member of the Tuscarora Indian Nation outside the Tuscarora Reservation without establishing that the regulations are justified by conservation necessity.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Cited Authorities

STATEMENT OF THE CASE

Facts

On February 9, 2003, petitioner Neil Patterson, Jr., a member of the Tuscarora Indian Nation, was ice fishing outside the boundaries of the Tuscarora Indian Reservation at Wilson-Tuscarora State Park on the shore of Lake Ontario in Niagara County. A New York conservation officer ticketed Patterson for using equipment that was not marked with his name and address, as required by New York's ice fishing regulations. *See* N.Y. Comp. Codes R. & Regs., tit. 6, § 10.4(a)(7) (2001). The state parkland where Patterson was ticketed was part of the lands of the Seneca Nation described in the Treaty of Canandaigua, Treaty of November 11, 1794, 7 Stat. 44, that the Senecas sold three years later in the Treaty of Big Tree, Treaty of September 15, 1797, 7 Stat. 601.

At his bench trial in Town of Wilson Justice Court, Patterson claimed that he was exercising a fishing right guaranteed to the Tuscaroras in the lands of the Senecas by the Treaty of Canandaigua and was thus exempt from the State's ice fishing regulations unless the State made a showing of "conservation necessity." The Justice Court rejected Patterson's claim, convicted him, and fined him $25. *See* Pet. Supp. App. at 55a-59a. The Niagara County Court likewise found that the Tuscaroras had no off-reservation treaty fishing right and affirmed Patterson's conviction and fine. *See* Pet. Supp. App. at 41a-54a.

The New York Court of Appeals affirmed. Pet. App. at 1a-12a. The court held that the Tuscaroras have no off-reservation treaty fishing right. Pet. App. at 5a-6a. The Court first turned to the plain language of the Treaty of

Canandaigua, 7 Stat. at 45. It construed articles III and IV of the Treaty, which provide that the United States will not claim the Seneca lands or disturb "the free use and enjoyment thereof," as protecting usufructuary rights only until the Senecas sold their lands. Pet. App. at 6a-8a. The Court of Appeals found confirmation of its views in this Court's interpretation of the relevant federal treaties in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 121-23 n.18 (1960). *See* Pet. App. at 8a-10a. In *Federal Power Commission*, this Court concluded that the Treaty of Canandaigua "was with another Indian Nation (the Senecas)" whose 1797 sale of their lands in the federally-approved Treaty of Big Tree "freed them from the effects of the Treaty of Canandaigua." 362 U.S. at 121 n.18. The Court of Appeals held that this Court's holding in *Federal Power Commission*, 362 U.S. at 123, that the lands at issue in that case "are not subject to any treaty between the United States and the Tuscaroras," also applied to the state parkland where Patterson was ticketed, which "was situated within the same former Seneca tract." Pet. App. at 9a. The Court of Appeals concluded that, in the absence of a valid off-reservation treaty fishing right, New York could enforce its ice fishing regulation against Patterson without a showing of conservation necessity. Pet. App. at 5a-6a.

Historical Background

This Court has extensively documented the history of the Tuscaroras in western New York and of transactions involving western New York lands formerly occupied by the Indians. *See Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *Massachusetts v. New York*, 271 U.S. 65 (1926); *New York ex rel. Kennedy v. Becker*, 241

U.S. 556 (1916).[1] That history is briefly recounted here because it establishes that the Tuscaroras have no off-reservation federal treaty fishing right in the state parkland where Patterson was ticketed.

In the eighteenth century, the Tuscarora Nation sold its aboriginal lands in North Carolina, relocated to New York State, and joined the Iroquois Confederacy, which then became known as the "Six Nations" (also including the Mohawks, Oneidas, Onondagas, Cayugas and Senecas). *Federal Power Commission*, 362 U.S. at 121-22 n.18; *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 417 n.6 (1942 ed.). The Tuscaroras settled with the Oneidas in central New York, about 200 miles east of their current Niagara County reservation. *Federal Power Commission*, 362 U.S. at 121-22 n.18. The Tuscaroras had no proprietary interest in the Oneidas' lands, and were there as guests or tenants at will or by sufferance of the Oneidas. *Id.* After the American Revolution, some Tuscaroras relocated to the Niagara region and settled among the Senecas. *Id.* The Tuscaroras had the same kind of tenure with the Senecas, that is, as guests or tenants at will or by sufferance, as they had earlier with the Oneidas in central New York. *Id.*

The United States signed the Treaty of Canandaigua in 1794. Treaty of November 11, 1794, 7 Stat. 44. That Treaty specifically referred to the lands of the Senecas, Oneidas, Cayugas and Onondagas, but did not mention the Tuscaroras.

---

1. The Second Circuit and the United States District Court for the Western District of New York also extensively reviewed the history of Indian land transactions in the Niagara region in their recent decisions in *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004), *aff'g* 206 F. Supp. 2d 448 (W.D.N.Y. 2002).

7 Stat. at 44-47. Article III of the Treaty described the "land of the Seneka nation" and provided that the described land was the Senecas' property and that the Senecas had the right to sell it:

> Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

7 Stat at 45. In exchange for the United States' guarantee of the free use and enjoyment of their land, the Six Nations agreed in article IV of the Treaty never to claim any other lands:

> The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

Id.

In 1794, Robert Morris, acting on behalf of the Holland Land Company, had acquired (subject to the Senecas' right of occupancy) a large portion of western New York, including the Seneca lands described in the Treaty of Canandaigua. *Federal Power Commission*, 362 U.S. at 123 n.18; *Massachusetts v. New York*, 271 U.S. at 94-95; *Becker*, 241 U.S. at 561. In the Treaty of Big Tree, Treaty of September 15, 1797, 7 Stat. 601, the Senecas sold all of their lands (with the exception of certain reservations not relevant here) to Morris. *See Massachusetts v. New York*, 271 U.S. at 95; *Becker*, 241 U.S. at 560-61. The Treaty was made under the authority of the United States in the presence of a federal commissioner, and President Adams proclaimed it following ratification by the Senate on April 11, 1798. *See Becker*, 241 U.S. at 561. The Senecas' conveyance extinguished Indian title to the ceded lands. *See Massachusetts v. New York*, 271 U.S. at 95 (citing a resolution of the Massachusetts legislature passed March 8, 1804). The lands, soon resold, passed by the Big Tree conveyance into private ownership and have since been considered to be subject to the jurisdiction and sovereignty of the State of New York. *Becker*, 241 U.S. at 561-62.[2]

The land that the Senecas conveyed to Robert Morris at Big Tree included both the land that later became the Tuscarora Indian Reservation, which was at issue in *Federal*

---

2. In the Treaty of Big Tree, the "said parties of the first part" (*i.e.*, "the sachems, chiefs, and warriors of the Seneka nation of Indians") "and their heirs" reserved from the conveyance to Morris "the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." 7 Stat. at 601-602. In *Becker*, this Court held that, while exercising this off-reservation "privilege of fishing" on the land ceded at Big Tree, the Senecas were subject to state regulation to the same extent as non-Indians. 241 U.S. at 563-64.

Power Commission, and the land that later became Wilson-Tuscarora State Park. *See Federal Power Commission*, 362 U.S. at 123 n.18; *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 557 (W.D.N.Y. 2002) (App. N) (map showing the Big Tree sale as including the entire Lake Ontario shoreline in the Niagara region of New York, except for a one-mile-wide strip adjacent to the Niagara River), *aff'd*, 382 F.3d 245 (2d Cir. 2004). After the Treaty of Big Tree, the Tuscaroras acquired the lands that became their reservation from the Holland Land Company, Morris's successor in interest, in three separate conveyances occurring in 1798, 1799, and 1804. *Federal Power Commission*, 362 U.S. at 106 n.10, 123 n.18; *see also Handbook of Federal Indian Law* at 423 n.79.

REASONS FOR DENYING THE PETITION

After receiving a ticket for failing to comply with state regulations while ice fishing on state-owned parkland outside the Tuscarora Reservation, petitioner argued that the Treaty of Canandaigua bars New York from applying its fishing regulation to him without a showing of conservation necessity. The New York Court of Appeals rejected this defense, as had the lower state courts, relying upon this Court's holding in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), that the Tuscaroras retained no rights under the Treaty in light of the subsequent sale of those lands by the Seneca Nation.

Rather than claiming any conflict with the decisions of any lower federal court or state courts, petitioner now asks this Court to grant certiorari solely to revisit the New York Court of Appeals' decision. Requests for error correction rarely merit this Court's attention. *See* Sup. Ct. R. 10. More

importantly, the decision below is fully consistent with the relevant precedents of this Court. It is well settled that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *see also Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 465 (1995); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991). *Federal Power Commission* makes clear that the Treaty of Canandaigua provides the Tuscaroras with no rights that would allow them to evade routine application of New York's fishing laws. Accordingly, the petition for a writ of certiorari should be denied.

I. The New York Court of Appeals Did Not Decide Any Federal Question In A Way That Conflicts With The Decisions of This Court.

A. *Federal Power Commission v. Tuscarora Indian Nation* Disposes of Petitioner's Claim.

Not only is there no conflict between the decision below and the precedents of this Court, but as the New York Court of Appeals properly recognized, this Court's decision in *Federal Power Commission* disposes of petitioner's claim. In *Federal Power Commission*, the Tuscarora Indian Nation challenged the taking of a portion of its reservation near the Niagara River for a hydroelectric plant reservoir. 362 U.S. at 100. The Tuscaroras argued, among other things, that the United States had guaranteed them the "free use and enjoyment" of their lands in the Treaty of Canandaigua, and

noted that they were not a party to the sale of the Seneca lands in the Treaty of Big Tree. *See* 362 U.S. at 121 n.18; Brief of Respondent Tuscarora Indian Nation at 4, *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) (No. 63).

After reviewing the history of the Tuscaroras and their New York lands, this Court concluded that the Tuscaroras retained no rights under the Treaty of Canandaigua:

> By the Treaty of Canandaigua . . . it was recognized that the Senecas alone had possessory rights to the western New York area here involved and, as a result of that treaty, a large tract of western New York lands, including the lands now owned by the Tuscaroras, was secured to the Senecas. . . . And at the Treaty of Big Tree . . . , [Robert] Morris, with the approbation of the United States, purchased the Senecas' rights of occupancy in the lands here in question for the Holland Land Company. Thus, *the lands in question were entirely freed from the effects of all then existing treaties with the Indians*, and the Tuscaroras' title to their present lands derives . . . from the Holland Land Company . . . and has never since been subject to any treaty between the United States and the Tuscaroras.

362 U.S. at 122-23 n.18 (emphasis added).[3]

---

3. While petitioner characterizes this language as "dictum," Pet. at 11 n.4, this Court indicated otherwise. *See Federal Power Comm'n*, 362 U.S. at 123 ("we must *hold* . . . that the lands in question are not subject to any treaty between the United States and the Tuscaroras") (emphasis added).

The Court of Appeals properly concluded that under *Federal Power Commission*, petitioner has no treaty right to engage in off-reservation fishing on former Seneca lands. As this Court explained, and the court below recounted, the Tuscaroras inhabited Seneca land as "guests or tenants at will or by sufferance," and the Treaty of Canandaigua provided the Tuscaroras, who were not even mentioned, with no further rights to those lands. Pet. App. at 9a (citing *Federal Power Commission*, 362 U.S. at 121 n.18). The Tuscaroras' rights in the Seneca lands were wholly contingent on the Senecas' continued ownership and thus were terminated in 1797 when the Senecas sold nearly all their land, including the land where petitioner was ticketed, in the Treaty of Big Tree. Pet. App. at 8a.

Petitioner's efforts to distinguish *Federal Power Commission*, *see* Pet. at 11 n.4, are unpersuasive. That the state parkland where petitioner was ticketed was not directly at issue in *Federal Power Commission* is irrelevant because that parkland was also part of the tract that the Senecas sold at Big Tree. That *Federal Power Commission* did not specifically involve fishing rights, *see id.*, is also irrelevant in light of this Court's holding that the Treaty of Big Tree "entirely freed" the former Seneca lands – including the parkland where petitioner was ticketed – from all "effects" of the Treaty of Canandaigua, including the "free use and enjoyment" guarantee on which petitioner relies.

Petitioner's remaining efforts to discredit the decision below also lack merit. He claims that the Tuscaroras' free use and enjoyment of the Seneca lands could not be "extinguished by implication," or through a land sale by the Senecas alone. *See* Pet. at 20-25. But as explained above, *Federal Power Commission* holds precisely the contrary: that

the Treaty of Big Treaty "entirely freed" the subject lands from the effects of all existing Indian treaties. Petitioner also contends that the Senecas' reservation of fishing and hunting rights in the Treaty of Big Tree should also inure to the Tuscaroras' benefit. *See* Pet. at 24 n.7. This issue was not raised or decided below and thus should not be considered by the Court. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992). In any event, those reserved rights were limited to the Senecas alone. *See* Treaty of September 15, 1797, 7 Stat. 601, 602.

B. The Decision Below Does Not Conflict With Any Decisions of This Court.

While petitioner claims that the New York Court of Appeals failed to follow relevant decisions of this Court, no such conflict exists. Petitioner first claims that the court below departed from this Court's decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and the other cases regarding the distinction between usufructuary and possessory rights held by Indian tribes. Pet. at 15. The fishing rights at issue in *Mille Lacs* were independent of land ownership because the Indians expressly retained them from a tribal land cession, and the rights were therefore not "tied to a reservation." *See Mille Lacs*, 526 U.S. at 177, 201-02.[4] Here, in contrast,

---

4. Several of the other cases relied upon by petitioner, *see* Pet. at 15-16, also involved the express retention of fishing rights. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662, 667-68 (1979), and *United States v. Winans*, 198 U.S. 371, 378 (1905). As for *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), *see* Pet. at 20-21, that case is distinguishable because this Court found that treaty hunting and fishing rights survived a termination act (rather than a later treaty) on the ground that a contemporaneous congressional enactment reflected an intent to preserve them. *See* 391 U.S. at 110-11.

petitioner claims a fishing right that is not independent of land ownership but instead is tied to a reservation: he asserts that the fishing right is a component of the "free use and enjoyment" of the Seneca reservation described in the Treaty of Canandaigua. *Cf. United States v. Dion*, 476 U.S. 734, 738 (1986) (treaty reservation of lands to Indians includes the exclusive right to hunt and fish on the reserved lands).

Unlike the rights in *Mille Lacs*, fishing rights that are tied to a reservation can be terminated by a sale of the reservation that does not mention them. In *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766-68 (1985), the Court held that the Klamath Tribe's unequivocal conveyance of all its claim, right, title, and interest in and to a portion of the Tribe's reservation ceded its hunting and fishing rights in that portion, even though these rights were not mentioned, because they did not exist independently of the reservation. And, as discussed above, this Court held in *Federal Power Commission* that the Senecas' sale of their lands in the Treaty of Big Tree "entirely freed" them from the effects of all existing Indian treaties so that the Tuscaroras had no right of free use and enjoyment of the former Seneca lands. *See Federal Power Commission*, 362 U.S. at 123 n.18. These cases, rather than *Mille Lacs*, control here.

Second, petitioner asserts that the New York Court of Appeals ignored several of this Court's canons of treaty construction. The construction given the Treaty of Canandaigua by the court below, however, follows directly from *Federal Power Commission*, and thus surely does not conflict with this Court's precedent. It also comports with the relevant canons. Petitioner primarily complains that in rejecting his claim to continued "free use and enjoyment" of

the former Seneca lands, the court below rendered article IV of the Treaty surplusage. Pet. at 17-18. But article IV does not create any Tuscarora rights beyond those that are arguably conferred by article III; it simply summarizes the consideration provided by the United States in articles II and III of the Treaty in exchange for the tribes' cession of all other Indian lands in article IV. *See* Treaty of November 11, 1794, 7 Stat. at 45.

Petitioner also argues that Indian treaties should never be construed to the tribes' detriment. *See* Pet. at 18-19. But that principle, of course, does not require a result favorable to tribes, regardless of a treaty's language. As this Court has held, "Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice." *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943). *See also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist."); *Klamath Indian Tribe*, 473 U.S. at 774 ("courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' . . . clearly runs counter to a tribe's later claims").

II. This Court's Recent Decision In *City of Sherrill v. Oneida Indian Nation* Provides An Alternate Ground For Affirmance.

Even if petitioner could identify some conflict between the decision below and the decisions of this Court or any federal or state appellate court, this case provides a poor vehicle for addressing petitioner's claims about the scope of the Treaty of Canandaigua. In its recent decision in *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478 (2005),

this Court held that the Oneida Indian Nation could not unilaterally assert sovereignty over land reacquired in its former reservation. It relied on the Indians' extreme delay in asserting the claim, the longstanding exercise of state regulatory authority over the area, and the non-Indian character of the area's population. *See id.* at 1483; *see also Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926) (impossible to rescind cession and restore lands to tribal members where lands were occupied by innumerable innocent purchasers); *Felix v. Patrick*, 145 U.S. 317, 334 (1892) (formerly wild land was developed by purchasers in reliance on the cession).

As the State of New York argued in the court below, these same considerations weigh strongly against construing the Treaty of Canandaigua to confer upon the Tuscaroras a continuing right of "free use and enjoyment" in the former Seneca lands.[5] Such a result would contradict the understanding that has prevailed for more than two centuries that the Treaty of Big Tree "extinguished all the Indian rights in the land referred to." *Massachusetts v. New York*, 271 U.S. 65, 95 (1926) (citing a resolution of the Massachusetts Legislature passed March 8, 1804); *see also New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 561-62 (1916) ("[t]he lands — which were soon resold — thus passed by the [Big Tree] conveyance into private ownership and were subject to the jurisdiction and sovereignty of the State of New York"). The Tuscaroras have failed to press this claim

5. New York's brief in the Court of Appeals, submitted before this Court decided *Sherrill*, argued that the Tuscaroras' inordinate delay in asserting their treaty rights and the vast changes in the character of the region since 1797 barred petitioner's claim. *See* Brief of Respondent State of New York at 25-26, *People v. Patterson*, 5 N.Y.3d 91 (2005) (No. 91).

in the intervening 200 years, during which time the wilderness ceded by the Senecas in 1797 has been heavily developed by generations of owners in reliance on the understanding that any Indian claim to the region was extinguished during the administration of President John Adams. A judicial finding that Tuscarora rights to the former Seneca lands were not extinguished by the Treaty of Big Tree "would seriously disrupt the justifiable expectations of the people living in the area." *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

Thus, even if this Court were to revisit the construction of the Treaty of Canandaigua set forth in *Federal Power Commission*, *Sherrill* provides alternate grounds for affirming the decision below. Accordingly, this Court should deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
State of New York
MATTHEW J. MURPHY III
Niagara County District Attorney

CAITLIN J. HALLIGAN
Solicitor General and
Counsel of Record

DANIEL SMIRLOCK
Deputy Solicitor General

PETER H. SCHIFF
Senior Counsel

ANDREW D. BING
Special Assistant District Attorney
Assistant Solicitor General
New York State Office of the
Attorney General
120 Broadway
New York, New York 10271
(212) 416-8016

THOMAS H. BRANDT
Assistant District Attorney
Niagara County Courthouse
Lockport, New York 14094
(716) 439-7085

Co-Counsel for Respondent
State of New York

198093

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

(2)

05-550 OCT 25 2005

No. _____

IN THE

Supreme Court of the United States

NEIL PATTERSON, JR.,

Petitioner,

v.

NEW YORK,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Thomas P. Schlosser*
Rob Roy Smith
MORISSET, SCHLOSSER, JOZWIAK & MCGAW
801 Second Ave., Ste. 1115
Seattle, WA 98104-1509
(206) 386-5200

**Counsel of Record for Petitioner*

APPENDIX F — NIAGARA COUNTY COURT DECISION AND ORDER

STATE OF NEW YORK
COUNTY OF NIAGARA

NIAGARA COUNTY COURT

PEOPLE OF THE STATE OF NEW YORK,

vs.

APPEAL TO COUNTY COURT FROM THE TOWN OF WILSON COURT Index No. 16086

NEIL PATTERSON, Jr.
Defendant.

DECISION and ORDER

SPERRAZZA, J.

The defendant/ appellant is a member of the Tuscarora Indian Nation, which is one of the Six Nations of the Iroquois Confederacy or Haudenosaunee. On February 9, 2003 the defendant was ice fishing in Wilson Tuscarora State Park where he was observed by

Appendix F

Environmental Conservation Officer Richard Lang. Officer Lang noticed that the defendant did not have an identifying tag on his ice fishing rig, or tip-up. The lack of an identifying tag on a tip-up is a violation of 6 N.Y.C.R.R. § 10.4-7. Officer Lang issued a citation, returnable in the Wilson Town Court. The defendant pled not guilty and requested a trial.

At the trial of the matter, Officer Lang, who prosecuted the case, testified as to his observations and the lack of an identifying tag on the defendant's tip-up.

The defendant responded that it was his belief that the State does not have jurisdiction over aboriginal territory and that State Conservation Law may be applied to Native Americans off their reservation only when the law's purpose is "preserving conservation of resource."

Officer Lang responded that when off the reservation, Native Americans must follow the rules enacted. He cited a memorandum of his department which states that Native Americans are to comply with all laws and regulations regarding seasons, bag limits and size limits. Lang further argued that the subject regulation has as its purpose the conservation of resource.

The defendant supplied to the court a case decision and two treatise citations, which are not contained in the court record, reportedly relating to the limits imposed upon the state's power to regulate Native American hunting and

fishing rights. The defendant stated that his actions were guaranteed by the "Treaty of Canandaigua in 1794" (hereafter "Treaty of 1794"). Lang responded that the regulation applies to all individuals within the state.

The court ruled that the defendant had violated the statute and fined him $25.00 The defendant has appealed the judgment of the lower court.

In his Affidavit of Errors filed pursuant to Criminal Procedure Law § 460.10, the defendant cites two defects in the ruling of the court which are the subject of his appeal. First, the defendant argues that the court did not correctly apply the doctrine of "conservation necessity" which limits state enforcement of conservation regulations against Native Americans exercising treaty hunting and fishing rights. The defendant also contends that the guidelines put forth by the Department of Environmental Conservation, Division of Law Enforcement, which state that Native Americans must comply with "legally established seasons, bag limits and size limits", meant that it was the policy of the Department to not apply the regulation requiring an identifying tag on tip-ups to Native Americans.

In his brief on appeal, the defendant argues that he was exercising rights guaranteed by The Treaty of 1794 to fish at Wilson Tuscarora State Park. As such, any state regulation which limits his fishing rights would only be lawful, as applied to him, if the People could show that the

regulation itself was reasonable and necessary to conservation and that its application to Native Americans was also necessary for conservation. Further, the defendant agues that it is the People's burden to show the necessity of the regulation in question. The defendant cites a number of cases supporting this position (Tulee v. State of Washington, 668 U.S. 681; Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392; United States v. Washington, 384 F. Supp 312, aff'd 520 F.2nd 676; Antoine v. Washington, 420 U.S. 194). The defendant contends that the failure of the court to apply this rule of law was a failure of constitutional dimensions in that it violated the Supremacy Clause of the United States Constitution.

Upon review of the cited cases, the Court agrees that the conservation necessity doctrine, if applicable in this case, would place upon the People at trial the burden of showing that the regulation passed the standard set by the Supreme Court. However, for this doctrine to be applicable in this case, the defendant, who was not on a reservation, must have been exercising rights guaranteed to him by treaty. The initial burden therefore is upon the defendant to establish that he is a Native American exercising rights established under a treaty.

In his brief, the defendant argues that the issue is one of subject matter jurisdiction. However, the Wilson Town Court does have jurisdiction to hear criminal cases regarding violations of the state environmental

conservation regulations against any person, including Native Americans. Rather, the issue raised by the defendant is in the nature of a defense under Penal Law § 35.05(1) in that the defendant is conceding that he did the act but is asserting that his conduct was authorized by law or a judicial decree, i.e. the law of conservation necessity.

The Court has framed this question in the context of a defense raised by the defendant pursuant to Penal Law § 35.05-1 and the Court is aware of the obligation placed upon the People by Penal Law § 25.00 to disprove a defense beyond a reasonable doubt. To establish a defense to which the People must respond, the defendant must at least present sufficient evidence from which it would be reasonable to conclude that the defense may apply. The defendant here has fallen short of that requirement.

The defendant stated at trial the he was exercising rights pursuant to the Treaty of 1794. However, according to the record on appeal, the defendant did not present the Treaty to the court, nor did he present any evidence that the area where he was fishing was included within the Treaty. This Court has examined the Treaty of 1794 and, without a map or some historical context not contained in the trial record, could not make a determination from the face of the Treaty that the Wilson Tuscarora State Park was land within the area delineated by the Treaty. For example, the Treaty of 1794 gives the property description for the relevant land in Article III as "*The land of the*

Appendix F

Seneca nation is bounded as follows: beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps, the land runs westerly along the lake, as far as O-yon-won-yeh Creek, at Johnson's landing place . . . ." It is certainly not apparent to the Court, from this description, that this land includes present day Wilson Tuscarora State Park.

The defendant argues that his treaty fishing rights arise from the language in Article III as follows: "*Now the United States acknowledge all the land within the aforementioned boundaries to be the property of the Seneca nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.*"

The defendant claims rights under this Treaty but his tribe is not mentioned by name and again, it takes some historical knowledge, outside of the proof presented by the defendant, to recognize that the Tuscarora Tribe was one of the Six Nations of the Iroquois and that the land in question is that mentioned in Article III of the Treaty of 1794.

The area where he was fishing is obviously no longer tribal land so there must have been some

intervening transaction which caused this land to be the public property of the State of New York. The defendant presented no proof to the court as to the nature of that transaction or that the right to "free use and enjoyment" of the land survived the transaction.

The defendant presented no proof that his tribe resided in the area at the time of the execution of the treaty or that it was their custom and practice at the time to fish in the area that is presently Wilson Tuscarora State Park. He presented no evidence that his tribe had aboriginal history or rights in the area.

Were the defendant's statements made in this trial deemed sufficient to raise the defense that his otherwise unlawful actions were authorized by law or judicial decree, then any person charged with a violation of such a regulation could appear in court, claim membership in a tribe, announce the existence of a treaty which purportedly granted him rights, and thereby place a burden of proof upon the People. Based upon the unsupported claim of the defendant, the People would have to prove, beyond a reasonable doubt, that the defendant was not a member of the tribe, or that the treaty did not grant the rights claimed, or that the tribe had not historically fished at that location, or that the treaty did not apply to the land in question. The unfairness of such a position is obvious, for which reason the Court finds it proper that the defendant raising such a defense present reasonable evidence in support of his position.

Appendix F

On the record below, the Court does not find that the defendant put forward sufficient proof from which it could be reasonably concluded that he was exercising rights guaranteed to his tribe under a treaty. Therefore, the defense was not established and the State was not placed under the burden of proving that the regulation was necessary for conservation purposes.

This Court would reach a different conclusion if there was legal precedent dealing with the Tuscarora Tribe which established the existence of their treaty fishing rights at the location under the Treaty of 1794, or some other treaty. Then, it would be sufficient for the defendant to appear in court and cite his status as a Tuscarora. However, the burden was on the defendant, in this case of first impression, to present some proof of the existence of such rights.

Upon this line of reasoning, the Court finds that the defendant, who admitted the act in question and did not raise a viable defen..., was properly convicted of the offense charged.

Were this Court to find that the defendant had sufficiently raised the defense, we would nonetheless find that the People had disputed it by the contention of the conservation officer that the regulation applies to the defendant off the reservation. Then the question before the trial court would have been- Did the defendant have usufructory fishing rights pursuant to the Treaty of 1794?

Appendix F

It appears that the lower court answered this question in the negative. In the court's return, in response to the Affidavit of Errors, the court stated that the conservation necessity doctrine raised issues which the court felt were not applicable to the case and that the defendant must comply with the charged regulation, as well as other rules and regulations, while off reservation land.

This Court finds that the lower court's ruling was correct as a matter of law. In reaching this determination, the Court has examined several cases which have dealt with the Treaty of 1794 and its background. Some of these cases set out an extensive exposition, based upon the factual records made before those courts, of the history of the Native American population of Western New York from earliest times up to and beyond the time of the Treaty (see, Seneca Nation of Indians v. State of New York, et al, 206 F. Supp. 2nd 408; People ex rel. Kennedy v. Becker, 215 N.Y. 2d 881, aff'd 36 S. Ct. 705; Tuscarora Nation of Indians v. Power Authority of the State of New York, 164 F. Supp. 107; Federal Power Commission v. Tuscarora Indian Nation,326 U.S. 99, 80 S.Ct. 543, 4 L. Ed 2nd 584).

The Court finds that it must follow the reasoning and ruling of the Supreme Court in Federal Power Commission v. Tuscarora Indian Nation, *supra*. The Court noted there that the Tuscarora were recent inhabitants of the area at the time of the treaty, having moved from North Carolina within the previous fifty

years. They had no aboriginal interest in the area but were tenants at sufferance of the Seneca. The Court interpreted the Treaty as recognizing that the Seneca alone had title to the Western New York area and that the land was sold by the Seneca to Robert Morris pursuant to the Treaty of Big Tree of 1797. The Court stated that, by the terms of this Treaty and sale, the "lands were entirely freed from the effects of all then existing treaties with the Indians . . ." (326 U. S. at p. 121, n. 18). The Court in that case was not dealing with Wilson Tuscarora State Park but with nearby lands actually owned and held in fee by the Tuscarora, which the government wished to take for a power project. The Court held that the lands in question are not subject to any treaty between the United States and the Tuscarora (at p. 123). From this ruling, it naturally flows that the land which is now Wilson Tuscarora State Park would also be held free from any treaty with the Tuscarora. In Tuscarora Nation Indians v. Power Authority of the State of New York, 164 F. Supp. 107, the District Court stated that "the original right of Indian occupancy and the pre-emptive rights in the lands now occupied by the plaintiff were actually extinguished by the Treaty of 'Big Tree.'" (at p. 112).

The Court is aware that the rule of treaty construction is that any ambiguities should be resolved in favor of the Native Americans and that the treaty should be interpreted in the way in which it would have been understood by the signatories at the time (Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753,

766, 105 S.Ct. 3420, 3428, 87 L.Ed.2d 542 (1985); People ex rel. Kennedy v. Becker, 241 U.S. 556, 36 S. Ct. 705, 60 L. Ed. 1166). This rule developed so that the "more sophisticated" party would not take advantage of the Native Americans in their dealings. In this case, some of the historical reading indicates that the Indians, led by Red Jacket, may have been the shrewder, more persistent bargainers (Seneca Nation of Indians v. New York State, 206 F. Supp. 2d 408 at 483, et seq.).

It appears to this Court, in light of the historical context, that the language of the Treaty of 1794 is clear and unambiguous. The purpose of Article III of the treaty of 1794 was to deal with the Seneca Nation and to secure to that Nation their property rights in the area of Western New York, in return for peace (see generally, Seneca Nation of Indians v. State of New York, 206 F. Supp. 2d 408 at 483, et seq.). The relevant portion of the Treaty of 1794 is: "*Now the United States acknowledge all the land within the aforementioned boundaries to be the property of the Seneca nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.*"

The clear language of the treaty, read as a contract or agreement between the parties, was that the Seneca and

the other Six Nations could own, use, and enjoy the land, until the Seneca chose to sell it. The Tuscarora were tenants at sufferance of the Seneca, that is, their guests, and their right to the land would have terminated when their host sold the land. There is no reading of the Treaty which could be interpreted to mean that the right to possession or use of the land by the Seneca would continue should they choose to sell it outright. Nor is there any ambiguity which would have led the "guests" to believe their rights to be greater under the Treaty than that of their hosts. The defendant has presented no evidence that the Tuscarora believed any differently at the time of the Treaty. It is only reasonable to conclude that the Tuscarora, having recently been driven from their ancestral home by white settlers and arriving in this State, would certainly be aware that their use and enjoyment of the land was at the sufferance and pleasure of the Seneca, and could be revoked by the Seneca at will.

The defendant would argue that, based upon the development of the law in this area (Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753; Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U. S. 172), the usufructory rights of the Tuscarora would have continued until extinguished by the Tuscarora in another treaty. However, unlike the cited cases, the Tuscarora had no relationship to this land independent of their relationship with the Seneca. The Treaty of 1794 clearly states that this was Seneca land. There is no evidence that the Tuscarora at the time believed their right

to use of the land would continue if it was sold. They may have expected the land would never be sold by the Seneca, but the Treaty gave them no illusions as to the consequences of a sale.

Neither can it be said that the Native Americans of the time would have thought that an outright sale of the land would not affect their use and enjoyment of the fruits of the land. When the Seneca did sell the land pursuant to the Treaty of Big Tree of 1797, a provision was made as follows: "*Also, excepting and reserving to them, the said parties of the first part and their heirs* (the Seneca), *the privilege of hunting and fishing on the said tract of land hereby intended to be conveyed.*" The Treaty of 1797 was with the Seneca Nation alone. The Seneca knew the necessary language to preserve their hunting and fishing rights and used such language to reserve certain privileges for themselves, but not the other members of the Six Nations.

The court therefore finds that the ruling of the lower court, that the doctrine of conservation necessity was not applicable, was correct as a matter of law.

The defendant also argues in his Affidavit of Errors that the court failed to properly interpret the rules of the State DEC Guidelines. The defendant cites a memorandum of that department which states that "Native Americans fishing off the reservation must comply with all

laws and regulations regarding seasons, bag limits and size limits."

However, the context of this memorandum was that the officer of the DEC was addressing the issue of whether Native Americans were required to obtain fishing licenses. The memorandum cited an earlier letter from the Commissioner of the DEC to the Oneida in which Commissioner Jorling wrote "We do not agree, however, that the right to hunt and fish off Reservation lands also conveys the right to do so outside of legally established seasons, bag limits and size limits."

Taken in this context, it does not appear that the intent in this memorandum was to set as a policy of the DEC that only laws and regulations regarding seasons, bag limits and size limits were to be applied to Native Americans. Such a policy would be contrary to the clear language of 6 N.Y.C.R.R. 10.4 which states that it is applicable to all persons.

The decision of the lower court is affirmed. This constitutes the decision and order of the court.

/s_____
Hon. Sara S. Sperrazza
Niagara County Court Judge

Entered: /s

APPENDIX G — LETTER FROM ROBERT J. BOTZER RE APPEAL TO COUNTY COURT FROM WILSON TOWN COURT

Town of Wilson Justice Court
375 Lake Street
P.O. Box 537
Wilson, NY 14172

ROBERT J. BOTZER
Town Justice

716) 751-0549

May 23, 2003

Mr. Robert Graff, Principal Law Clerk
Niagara County Court House
1755 Hawley Street
Lockport, NY 14094

RE: Appeal to County Court from Wilson Town Court
People v. Neil Patterson, Jr.
Docket No. 03020023

Dear Mr. Graff:

In processing the appeal that I have rewritten my notes from the trial that was held on March 26, 2003 (enclosed). Also enclosed are copies of three sheets that officer Lang referenced at trial.

I received the attached Affidavit of Errors on May 21, 2003. In answer to the two issues of errors referenced in the affidavit, I make the following comments:

Appendix G

(a) No specific written "Doctrine of Conservation Necessity" was provided to this court at trial. Mr. Patterson's espousal of the doctrine of "Conservation Necessity" raised positions which I felt were not applicable to this case.

(b) NYCRR 10.4(7) requires all tip ups be marked with the name and address of operator. It is the opinion of this court that Mr. Patterson must comply with this regulation as well as all other rules and regulations while off reservation land, including the "legally established seasons, bag limits, and size limits."

If you require any further information, please do not hesitate to call. My clerk or I can be reached at (716) 751-0549.

Sincerely,

/s
Robert J. Botzer
Town Justice

Appendix G

Rewritten notes from Trial People Vs. Patterson 03/26/03

Mr. Neil Patterson requested to represent himself. He had no witnesses.

Officer Richard Lang prosecuted for the People.

Both Officer Lang and Mr. Patterson were sworn in and testified under oath.

Officer Lang – Testified that he found an individual in Wilson Tuscarora State Park ice fishing with a tip up lacking name and address on it. This individual also lacked a fishing license but was not issued a ticket because he was an American Indian.

Mr. Patterson – Testified that he is director of the Tuscarora Environment program on the Nation. States he was fishing with 1 tip up and one other line. Nation attorney has informed him that it was argued successfully that the state does not have jurisdiction over aboriginal territory. Conservation law only pertains to off reservation Native Americans when "preserving conservation of resource."

Officer Lang – Disputes Mr. Patterson's statement that rules can be broken off the reservation. Once off the reservation the Native American must follow the rules outlined by the April 6, 2002 memo as presented in court. Specifically cited was the last sentence "Native Americans

hunting and fishing off the reservation are required to comply with all laws and regulations regarding seasons, bag limits and size limits."

Mr. Patterson – States that the state does have the right but only to "preserving conservation of resource". He states, "Therefore, this memo backs up my argument". He states, "There is inconsistent policy with the state".

Officer Lang – Disagrees – Rules for tip up do include the conservation of resource. It could be used in the illegal taking of the resource (if the name and address were not placed on all the tip ups). Officer Lang asked Mr. Patterson if he had a copy of the New York State Fishing Regulations Guide and he did not. Officer Lang provided copies of the guide to the court and Mr. Patterson. Highlighted the section that states, "All tip ups must be marked with the name and address of the operator."

Mr. Patterson – Provided the court 3 documents (one appeals court decision and two sections of American Jurisprudence, second edition) outlining the states limitation of power to regulate American Indians' right to hunt and fish. Mr. Patterson states that this issue is not a violation of any section of Environmental Conservation Law, that his actions were guaranteed by the "Treaty of Canandaigua in 1794".

Officer Lang – States the law does not discriminate; it is the same for all individuals.

Appendix G

Decision: Mr. Patterson violated CRR 10.4 Sec. A7 by not having name and address on his tip up.

Fine = $25.00

Mr. Patterson said he would pay by "next week".
Approved by Wilson Town Court